STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: **QWEST COMMUNICATIONS CORPORATION,** Complainant, v. **SUPERIOR TELEPHONE COOPERATIVE,** *et al.*, Respondents.	DOCKET NO. FCU-07-02

PUBLIC REDACTED VERSION OF
QWEST COMMUNICATIONS CORPORATION'S RESPONSIVE POST-HEARING BRIEF

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Qwest hereby responds to the Opening Briefs of Farmers Telephone Company of Riceville, Iowa ("Riceville"), Farmers & Merchants Mutual Telephone Company of Wayland, Iowa ("Merchants"), Interstate 35 Telephone Company ("Interstate 35" or "I35") and Dixon Telephone Company ("Dixon") (collectively "Farmers Respondents"); Superior Telephone Cooperative ("Superior") and Great Lakes Communication Corp. ("Great Lakes") (collectively "Superior Respondents"); Aventure Communication Technology LLC ("Aventure"), and Reasnor Telephone Company, LLC ("Reasnor"). When Qwest is discussing all of the Respondents collectively, it will refer to them as the "LECs" or "LEC Respondents." Qwest does not here respond to every argument contained in the LECs' Opening Briefs for two reasons: (1) Qwest addressed most of these arguments in its Opening Brief, and (2) some of the arguments are so spurious, they do not merit responses. The Board therefore should not take silence in this brief as indicating agreement with any of the LECs' arguments. Qwest firmly believes the LECs' arguments are erroneous, and the Board should find for Qwest for each of the reasons set forth in its Opening Brief, this Response Brief, and the briefs of AT&T, Sprint and the Office of Consumer Advocate (OCA). Finally, Qwest attaches as Exhibit A, an electronic copy of proposed findings of fact and conclusions of law for the Board to utilize if it chooses.

I. INTRODUCTION: THE LECS' MASSIVE TRAFFIC PUMPING SCHEME IS INDEFENSIBLE.

The evidence Qwest presented at hearing – both testimonial and documentary – paints a picture of fraud on a massive level. Traffic pumping has all of the hallmarks of an illegal enterprise: plans to bilk large amounts of money, fraud, deceit, failure to comply with the most elementary precepts of law and the public interest, illogical rationalizations, forgery, and even improper distribution of pornography. One would never expect this of Iowa local telephone companies, supposed stalwarts of their communities. Yet, the facts indisputably show the LECs neck deep in the mire with no defenses or excuses. Rather than seeking forgiveness, the LECs compound their problems by trying to justify their illegal conduct. It shocks the conscience to see how traffic pumping, and the millions of dollars in illegal payments associated with it, drives this type of conduct. Thankfully, the Board is well positioned to address and purge it from the state for good.

The arguments the LECs make to try and justify their illegality are completely baseless, and show how far the LECs are willing to go to try and justify millions in illegal access charges. The evidence shows the LECs entered into business relationships – not end-user relationships – with their free calling service company ("FCSC") partners. The LECs never thought Qwest would obtain the discovery necessary to prove the details of their scheme. When discovery began, one of the LECs' lawyers sent an email admitting the scheme as constituted would obligate the LECs to refund the access charges. From that point forward, the excuses began and lie after lie emerged. The LECs are left arguing they "netted" for local service despite the fact that no accounting records, no emails, no calculations, no tax payments, indeed no documentation of any kind supports the claim of netting. Thus, the LECs are stuck between admitting they must refund the money, or admitting to a massive tax evasion. At present, before the Board, they are choosing tax evasion.

The LECs assert four primary arguments. And, in making these arguments, the LECs resort to misrepresenting the record or ignoring the mountain of facts contrary to a point they argue. First, they say the FCC's original decision in *Farmers and Merchants* controls the situation. They make this argument knowing the FCC has granted partial reconsideration, and knowing the decision was procured by forgery, fraud, and a cover-up. Second, they argue the FCC's decision in *AT&T v. Jefferson* made their conduct legal when a plain reading of the decision shows it stands for no such thing. Third, they argue their illegal conduct is irrelevant because the filed-rate doctrine saves them from themselves. However, the filed-rate doctrine states that the LECs can charge switched access only for calls that qualify under their tariffs; the LECs seek payments irrespective of whether the calls qualify. Thus, while the LECs proclaim "Filed Rate Doctrine!" it is they, not Qwest, that seek to avoid the doctrine. Finally, the LECs argue that, while their fraud may be massive, since most of the calling is interstate, the Board is powerless to act. This argument ignores that the root of the scheme is the LECs' abuse of their local exchange tariffs, local certifications, monopoly services, and the state's public interest. Thus, this Board is well positioned to address the root of traffic pumping.

The case is clear. As OCA stated in its Brief:

> The testimony and documentary evidence introduced by QCC, AT&T and Sprint establish beyond any rational dispute: (1) the FCSCs ... were not end-users subscribed to any tariff services of the Respondents LECs and (2) the toll traffic for which the LECs billed the IXCs and shared revenue with the FCSCs did not terminate at the premises of end-users. There is not one piece of credible documentary evidence offered by any of the Respondents to cast even the slightest doubt about these two facts. And these facts are dispositive of the ultimate issue before the Board....

Brief at 3. The Board should issue an order that proclaims clearly and unequivocally that traffic pumping in Iowa is illegal, violates the public interest and the LECs' certifications, is premised on discrimination, the calls in question fall outside of access tariffs, the LECs did not provide their FCSC partners with local exchange service, and the LECs must refund intrastate access charges.

II. THE BOARD SHOULD BAN TRAFFIC PUMPING PROSPECTIVELY AS VIOLATIVE OF IOWA LAW AND THE PUBLIC INTEREST.

Qwest, Sprint and AT&T put forward substantial evidence that traffic pumping is contrary to the public interest. While the LECs argue (erroneously) that traffic pumping is not discriminatory, and (erroneously again) that they did not believe traffic pumping was illegal, they spend little if any time arguing that traffic pumping should be allowed by this Board as worthy of their certifications and in the public interest. The reasons are obvious: traffic pumping is an abuse of monopoly control over switched access and the fact that long distance carriers have no choice but to deliver the calls to the dialed number. Also, while traffic pumping lines the pockets of a few people in Iowa, it primarily benefits FCSCs who have avoided having any actual presence in or paying taxes in Iowa.

Moreover, the roots of traffic pumping violate basic tenets of Iowa law. At its core, traffic pumping is premised upon a scheme to bilk carriers and abuse the system. It forces long distance carriers to subsidize an entire industry of purported "free" providers. Of course, these services are anything but free. Further, it is discriminatory: giving one group of purported customers benefits others do not receive. There is absolutely nothing redeeming about traffic pumping, and it is not the type of conduct people should think of when contemplating America's heartland.

This traffic pumping case poses two questions: (1) was the historical conduct improper, and (2) should the Board allow the conduct prospectively? From a purely forward-looking perspective, the Board should prohibit the LEC Respondents from ever again participating in traffic pumping, and issue an order that from a precedential perspective stops traffic pumping in Iowa. The Board should also lead the telecommunications industry by issuing an order, based on the complete factual record before it (the first of its kind in a traffic pumping case), that traffic pumping is illegal. The record evidence also shows the historical conduct was illegal, improper, and indefensible. The remainder of this brief addresses the historical conduct.

III. The Filed Rate Doctrine Requires the LEC Respondents to Provide the Services Contained in Their Tariffs and Prohibits Compensation for Services Not Covered by Tariff.

A. The LECs Violate the Filed Rate Doctrine by Charging Switched Access on Calls That Do Not Meet the Requirements of Their Access Tariffs.

The LECs act as though the filed rate doctrine excuses their abominable conduct. In reality, the LECs failure to follow their access tariffs mandates they refund the improper access charges. Iowa law plainly requires the LECs to provide their services pursuant to the terms of their tariffs. Iowa Code § 476.3(1) ("A public utility shall furnish reasonably adequate service at rates and charges in accordance with tariffs filed with the board."); Iowa Code § 476.4 ("Every public utility shall file with the board tariffs showing the rates and charges for its public utility services and the rules and regulations under which such services were furnished..."); 199 IAC 22.14(2)(a) ("Tariffs providing for intrastate access services shall be filed with the board by a telephone utility which provides such services.")

The filed rate doctrine requires the LECs to follow the rates, terms and conditions of their tariffs and prohibits the LECs from obtaining compensation for services that do not comply with those tariff terms. *AT&T Communications of The Midwest, Inc. v. Iowa Utilities Bd.*, 687 N.W.2d 554, 562 (Iowa 2004) ("the legal rights of the utility in the customer are measured exclusively by the published tariff."); *In re Exchange of Transit Traffic*, 2002 WL 535299, 8, (I.U.B. March 18, 2002) (no filed tariff covered the service at issue, therefore no obligation to pay for the service once disputed); *AT&T Co. v. Cent. Office Tel.*, 524 U.S. 214, 223-224 (1998) ("Rates .... have meaning only when one knows the services to which they are attached"); *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 195 (2nd Cir. 2001) ("*Central Office* defines 'rate' broadly to include both monetary and non-monetary terms of a contract, including the quality and the type of services"); *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 679 - 681 (8th Cir. 2009) (filed rate doctrine barred claim that carrier should have provided services that were not covered by the tariff/interconnection agreement); *Fax Telecomms. Inc. v. AT & T*, 138 F.3d 479, 482 (2d Cir.1998) ("[c]arriers are prohibited from providing communications services except pursuant to a filed tariff...''). To be entitled to charge a tariff rate, the carrier must actually provide the tariffed service in accordance with the express terms of the tariff; in contrast, if the service provided is different than that defined by tariff, the filed rate doctrine does not allow the carrier to collect the tariff rates. *See, e.g., American Tel. & Tel. Co. v. NOS Communications, Inc.*, 830 F. Supp. 225, 226-229 (D.N.J. 1993) (deny summary judgment on claims to collect unpaid tariff rates due to factual dispute whether AT&T provided the tariffed service);[1] *AT&T Corp. v. F.C.C.*, 317 F.3d 227, 238-239 (D.C. Cir. 2003) (remand to FCC for fact findings to address AT&T's claim that LEC did not actually provide access service, in which case, AT&T should not be liable for access charges); *cf., Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1171 -1172 (9th Cir. 2002) (filed rate doctrine did not bar claim that MCI had charged $10 fee without tariff authorization, on extraneous accounts for which it provided no services).

Here, none of the LEC Respondents' FCSC traffic satisfied the requirements of the LECs' access tariffs. As Qwest's Opening Brief shows in detail, before access charges can be imposed, calls must be delivered to an end user, an end user's premises, and terminate within the LECs' certificated exchange.

[1] To the extent past litigants have read *NOS* as supporting a state law claim for poor or inadequate service provided under a federal tariff (which is not the type of claim discussed in *NOS*), *AT & T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 532 (3rd Cir. 2006), recognizes that *Central Office* precludes such an argument. Qwest is not claiming poor service; Qwest is claiming that the LECs did not even provide the switched access services for which they have billed the IXCs. The *NOS* decision supports this position.

The LEC Respondents do not satisfy these requirements; thus, the filed rate doctrine bars them from charging Qwest for switched access.[2]

B. The LECs Failed to Show that the Service They Provided to the FCSC Was Local Exchange Service under the Local Tariffs.

The LECs realize the filed-rate doctrine torpedos their arguments if they cannot show the FCSCs received local exchange service. As Qwest set forth at hearing and in its Opening Brief, the record evidence uniformly shows the LECs failed to provide their FCSC partners with local exchange service. Qwest Brief at 20-22; Exhibit 1355. To try to counter this point, the Superior Respondents go so far as to try "re-submitting" an exhibit excluded by the Board at hearing. A post-hearing brief must rely on record evidence, not excluded evidence.[3] 199 IAC § 7.23(8)(c). However, even if the exhibit had been admitted, it contradicts the record evidence, which Jeff Owens painstakingly cited in his direct and rebuttal testimony. Exhibits 1 and 1275. The Farmers Respondents take a different tack, and argue that on three occasions Qwest admitted that the LECs provided local exchange service to their FCSC partners. Farmers Brief at 21. To make this point, the Farmers Respondents must take the evidence out of context.[4]

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[2] Reasnor cites portions of federal statutes and argues that calls to FCSCs are access calls and therefore compensable. Brief at 4. As Qwest explained in its Brief, following the federal definitions through shows that the service the LECs provide to the FCSCs is not for a fee, and therefore is not local exchange traffic, and therefore is not compensable access traffic. Qwest Brief at 42-43.

[3] Qwest has filed a Motion to Strike this portion of Superior Respondents' Brief.

[4] These are not the only instances where Farmers takes extreme liberties with the factual record. On page 9 of its Brief, the Farmers Respondents claim that Qwest charges terminating access on conference calls. In reality, Qwest Corporation does everything it can to ensure it does not charge for such calls by using 800 numbers and direct access lines. However, there are instances where customers do not use the product as intended and switched access might be charged on an extremely small percentage of calls where an end user mistakenly does not use the 800 number. Moreover, Qwest wants customers to use the 800 product; it does not share switched access revenues and has no scheme in place to attempt to bilk money from carriers, in stark contrast to the extensive scheme perpetrated by the Respondents and their FCSC partners. Exhibit 1298.

Likewise, on page 12, note 3 of their Brief, the Farmers Respondents claim Qwest has admitted the LECs' conduct was legal. The misrepresentation is obvious. In Exhibit 410, a Qwest employee stated that Qwest should assess the "legality" of the LECs' conduct. This is when Qwest first discovered the scheme. Qwest investigated, found the conduct illegal, and filed a complaint with the Board. Similarly, Exhibit 607 is the *ex parte* where Qwest stated to the FCC its understanding of the traffic pumping LECs' positions on issues and then provided Qwest's views on how to resolve them. The document quite obviously does not state Qwest's view of the issues, as Ms. Hensley Eckert testified. Tr. at 1308-09.

From the outset of the case, Qwest has stated that the FCSCs are not end users; however, if the Board finds otherwise, then the LECs are discriminating between customers. The Farmers Respondents list three instances where Qwest is talking about its discrimination claim. Brief at 21; *see also* Brief at 50, n. 17 (same incorrect assertion); Superior Brief at 7 (same inaccurate assertion). Thus, Qwest never admitted the LECs provide genuine local service in accordance with a filed tariff; Qwest has been consistent throughout. In modern litigation, pleading alternative claims (such as Qwest has done here) is routine. Fed. R. Civ. P. 8(d)(2); Iowa R. Civ. P. 1.402(2)(b).

Reasnor goes down a different road and argues there are only two possible classifications for services a LEC provides in delivering calls: local exchange or access service, citing *Bell Atlantic Telephone Companies v. F.C.C.*, 206 F.3d 1, 4-5 (D.C. Cir. 2000). Brief at 9, n.40. This grossly mischaracterizes the law. The cited decision does not state that a LEC's services *always* fall into one of these two categories. *Bell Atlantic* is simply one of the decisions addressing how ISP-bound calls should be classified.[5] Reasnor ignores that the federal statutes and regulations recognize several other possibilities (information service, private carriage, and transit traffic to name a few). Local exchange and access service were not intended as catch-alls that would give the LECs license to abuse the access charge regime. From the outset, the FCC was concerned that because the local loop is a "bottleneck" facility, regulators must scrupulously adhere to switched access principles. *Investigation of Access and Divestiture Related Tariffs and MTS and WATS Market Structure,* 49 FR 23924, 23924 (June 8, 1984). The filed rate doctrine is simple: switched access charges only apply to calls that satisfy the requirements of the LEC's access tariff. Reasnor's attempts to stuff everything into two buckets ignore this precept.

Finally, the Farmers Respondents claim Qwest admitted the conduct was legal because it acknowledged that in 2007, the FCC prevented LECs from continuing to opt out of the NECA traffic sensitive pool to traffic pump, citing the Transcript at 825. However, the legality of traffic pumping was not before the FCC in that proceeding. The fact that the FCC stated LECs could not opt out of NECA to traffic pump does not mean it was legal prior to that; it shows the FCC recognizes it is an insidious practice that must be stopped. The FCC's action in no way implies that historically traffic pumping was lawful.

[5] After two remands and a mandamus order, the FCC has issued its order finding that such calls, though not local, are nonetheless subject to reciprocal compensation. *In re High-Cost Universal Service Support et al.*, FCC 08-262, 2008 WL 4821547 ¶7 (Nov. 5, 2008).

C. The Facts and Law Show the FCSCs are Carriers or Partners, Not End Users.

Qwest's Opening Brief showed the FCSCs are partners of the LECs or, under the FCC's recent *InterCall* decision, carriers. *In re Request for Review of InterCall, Inc. of Decision of the Universal Service Administrator,* 23 FCC Rcd. 10731, 2008 WL 2597359 (Rel'd June 30, 2008). *Id.* at ¶26 (teleconferencing providers "are, at a minimum, providers of telecommunications for the purposes of contributing to the universal service fund"). Superior cites *InterCall* for one point, but claims the remainder of the decision is under reconsideration. Brief at 25. While petitions have been filed, the FCC has yet to grant reconsideration thereby distinguishing this situation from the FCC's October 2007 *Merchants* decision on which the FCC has granted reconsideration and further proceedings. Also, there is no hint of fraud or forgery in the *InterCall* case, as there clearly was in the *Merchants* case. Hence, the Board should consider the *InterCall* decision as precedent finding that conference providers are carriers.

The FCC's conclusion that the FCSCs are carriers is consistent with the evidence that shows they are the LECs' partners. The Farmers Respondents argue the FCSCs are not partners because they do not share profits and losses with the FCSCs. Brief at 24. However, this is not the law. As Qwest's Brief shows, Iowa's law of joint ventures – a form of partnership – does not require the sharing of losses to find a partnership. *Thomas v. Hansen,* 524 N.W.2d 145, 146 (Iowa 1994) (under Iowa law, it is not necessary for all of the usual indicia of joint venture, including a duty to share in losses, to be present). Here the LECs share access charges with FCSCs, which is essentially sharing profits. Moreover, they act with a common purpose, and the LECs need not pay their FCSC partners until the IXCs pay access charges. Thus, the LECs and FCSCs are partners as joint venturers. Further, it is not vital that Qwest or the other IXCs show that the LECs' relationship with the FCSC meet every criteria of a formal partnership; rather, what is important is that the evidence clearly demonstrates that the LECs and FCSCs were engaged in some form of profiteering venture that had no indicia of a carrier-end user relationship. In sum, regardless of whether the LECs and FCSCs were partners, joint venturers, or "wholesale" contract parties (as suggested by the title of many of the contracts), the FCSCs plainly were not end users under the Respondents' tariffs.

<u>D. The LECs' Attempts to Get Paid Even if the Calls Fall Outside of Their Access Tariffs Violate the Filed Rate Doctrine.</u>

The LECs' last-gasp effort is to ask the Board to award compensation even if the calls do not qualify for compensation under the access tariffs. They argue the tariff language does not matter because they provided some form of service to the IXCs when they delivered calls to the FCSCs. Farmers Brief at 4; Reasnor at 43-44. This is essentially a *quantum meruit* claim, and asks the Board to ignore the filed-rate doctrine – the very doctrine the LECs argue controls the case. Thus, the LECs are seeking compensation that is contrary to the statutes that require their filed tariffs to be followed. *Equal Access Corp. v. IUB,* 510 N.W.2d 147, 150-151 (Iowa 1993); *State Public Defender v. Iowa Dist. Court for Woodbury County*, 731 N.W.2d 680, 684 (Iowa 2007). This argument is doubly inappropriate for the LECs (Riceville, Superior, Great Lakes and Reasnor) that laundered traffic and thereby not only failed to meet their tariff terms but also provided the service outside of the exchange area for which it was billed. While the Board, as the administrative agency with authority to set reasonable rates for intrastate access could in certain circumstances set a reasonable rate for otherwise lawful services actually provided (Iowa Code § 476.3(1)), the LECs did not provide any lawful services on FCSC traffic. The LECs' services were at all relevant times unlawful because they were never tariffed and publicly noticed. It is not possible, therefore, for the Board to find ***any*** compensation to the LECs on FCSC traffic would be reasonable, let alone Reasnor's full access rate.[6]

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[6] Reasnor cites FCC decisions stating that a carrier who provided services not encompassed by its tariffs can nonetheless obtain compensation. Reasnor ignores that the FCC requires, *e.g.*, that the carrier has incurred *legitimate* costs on *lawful* services with no other means of compensation. *In re Total Telecomms. Serv., Inc.*, 16 F.C.C.R. 5726, 5742-5744 ¶37 (2001) (assumed access service was actually provided); remanded on appeal, *AT&T Corp. v. F.C.C.*, 317 F.3d 227, 239 (D.C. Cir. 2003) (FCC cannot require payment of access rates based on just presumption the service had been provided). *In re New Valley Corp. v. Pacific Bell*, 15 F.C.C.R. 5128, 5132 -5133 ¶¶10-12 (2000) (provided otherwise lawful intra-building circuits that were not described in special access tariff; plaintiff did not prove the special access rate was unreasonable or what a reasonable rate would have been); *In re America's Choice*

Indeed, the filed rate doctrine bars claims for *quantum meruit* or unjust enrichment because carriers cannot avoid the filed tariff requirement by pointing to purported benefits that the other party may have received that were not covered by the carriers' filed tariffs. *See, e.g., MCI WorldCom Network Servs., Inc. v. Paetec Commc'ns, Inc.*, 2005 U.S. Dist. LEXIS 37786, 2005 WL 2145499, at *5 (E.D. Va. Aug. 31, 2005), *aff'd*, 204 Fed. Appx. 271 (4th Cir. 2006) (barred unjust enrichment claim; carrier not entitled to payment on services not defined by tariff); *Union Tel. Co. v. Qwest Corp.*, 2004 U.S. Dist. LEXIS 28417, 2004 WL 4960780, at *15 (D. Wyo. May 11, 2004), *aff'd*, 495 F.3d 1187 (10th Cir. 2007) (barred unjust enrichment claim; no right to compensation for services not in plaintiff's tariff, regardless of compensation defendant received from its customers); *Alliance Communs. Coop., Inc. v. Global Crossing Telecomms., Inc.*, 2007 U.S. Dist. LEXIS 48091, 25-27 (D.S.D. July 2, 2007) (same). Thus, the filed-rate doctrine bars the LECs' equitable recovery arguments.

The Respondents further err by claiming that if the Board finds Qwest is not obligated to pay the tariffed access charges, then Qwest would enjoy a preferential rate and thus violate the filed rate doctrine. Plainly, where there is no tariff that covers the services provided, there is no tariff under which to be given a preferential rate. *See, e.g., In re Exchange of Transit Traffic*, 2002 WL 535299, 8, (I.U.B. March 18, 2002), *rehearing den'd* May 2, 2002; *Iowa Network Services, Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 902-904 (S.D. Iowa 2005), *aff'd*, 466 F.3d 1091 (8th Cir. 2006). Qwest is instead asking the Board to *enforce* Respondents' tariffs and require them to follow those tariffs in the future so that IXCs would then only pay switched access charges on calls that qualify for such charges.

E. To Avoid its Tariff Problems, Reasnor Is Even Willing to Argue Preclusion and Preemption, Despite Having Absolutely No Grounds for Either Argument.

The most ridiculous argument raised in any of the briefs (a high standard indeed) is Reasnor's view that the FCC's 2007 decision forbidding Reasnor from opting out of the NECA pool bars Qwest's

Communications, Inc., 11 FCC Rcd. 22494, 22503-04 (1996) (declined to rule on whether the services provided to resellers were not covered by tariff, because raised only in reply).

claims here through the doctrines of issue/claim preclusion and conflict preemption. Brief at 26. These arguments are truly frivolous. Claim preclusion requires final adjudication on the merits on "the same claim or cause of action within the meaning of this principle: preclusion applies if the acts complained of and the recovery demanded in the second claim are the same or when the same evidence will support both actions." *Marvin v. North Cent. Iowa Mental Health Center, Inc.*, 2006 WL 334281, 2 (Iowa App. 2006) (citing *Shumaker v. Iowa Dept. of Transp.*, 541 N.W.2d 850, 852 (Iowa 1995)). For claim preclusion based on administrative action, the agency must have "acted in a judicial capacity when they rendered the decisions, and the parties were given full opportunity to litigate the issues." *Central Scott Telephone Co. v. Teleconnect Long Distance Services and Systems Co.*, 832 F. Supp. 1317, 1321 -1322 (S.D. Iowa 1993). Similarly, issue preclusion requires that the issue be the same and fully litigated to a final decision in the previous case. *Larson Mfg. Co., Inc. v. Thorson*, 2009 WL 349578, *5 (Iowa, Feb. 13, 2009).

The 2007 tariff resistance case only concerned the switched access rates Reasnor could charge from July 1, 2007 forward for calls that fall within their tariffs. The issues before the Board concern whether Reasnor could charge switched access for calls delivered to One Rate from January 2006 through March 2007. Thus, this case concerns the applicability in the first instance of tariffed charges for a particular set of calls; that case concerned the setting of rates. This case concerns conduct before July 1, 2007; that case concerned rates after July 1, 2007. *In re Investigation of Certain 2007 Annual Access Tariffs*, 22 F.C.C.R. 21261, 21262 (Nov. 30, 2007). The two cases have no commonality whatsoever. The FCC tariff filing case also obviously did not concern any of the traffic pumping conduct that had occurred before July 1, 2007. Indeed, in the FCC case, there was no opportunity to litigate the historical conduct that is at issue before the Board. Accordingly, neither issue nor claim preclusion applies.

Conflict preemption likewise is inapplicable. Because the federal law does not evince intent to solely occupy the telecommunications field, federal preemption would only apply if the relief Qwest seeks would conflict with federal law or regulations. *Minnesota Public Utilities Com'n. v. F.C.C.*, 483 F.3d 570, 577 (8th Cir. 2007); *Horizon Homes Of Davenport v. Nunn*, 684 N.W.2d 221, 228 (Iowa 2004) (federal preemption applies either when federal law occupies the entire field or when state law/action would conflict with the federal). There is no conflict between the relief that Qwest seeks and the FCC's determinations in the 2007 tariff resistance proceeding: as noted, the issues are not the same. These arguments are a waste of the Board's time.

IV. <u>The LECs' Decision to Back Date Invoices and Contracts and Hide That Conduct From the FCC and Board Shows They Understood Calls Delivered to FCSCs Did Not Satisfy Tariff Requirements.</u>

Several of the LECs – Merchants, I35, Dixon, and Reasnor – backdated invoices and contracts for their FCSC partners in an effort to make it appear that the FCSCs were end-users. During the hearing, Qwest produced clear evidence that Merchants' manufactured evidence, presented forged evidence to the FCC, and intended the FCC to rely upon it. Exhibit 1356. The Board's cross-examination of Rex McGuire left no doubt it also understood Merchants had procured an FCC decision by falsifying evidence. Instead of coming clean or seeking forgiveness, the Farmers Respondents argue their backdating of contracts and invoices is business as usual. Brief at 34-35. The lack of remorse is striking and indicative of the mindset that permeates LECs involved in traffic pumping. Traffic pumping is anything but business as usual; it is abusive, contrary to tariffs, and illegal. While the LECs now argue that they did not know traffic pumping was illegal, the backdating of contracts and invoices shows otherwise. "When a party is once found to be fabricating or suppressing documents, the natural, indeed, the inevitable conclusion is that he has something to conceal, and is conscious of guilt." *Warner Barnes & Co. v. Kokosai Kisen Kabushiti Kaisha*, 102 F.2d 450 (2d Cir.), *modified*, 103 F.3d 430 (2d Cir. 1939) (J. Learned Hand).

In April 2007, the LECs understood that Qwest's lawsuit before the Board argued that the FCSCs were not the LECs' end-users, but their business partners. [[redacted]

[redacted].]

Exhibit 1356, Tab 6 (emphasis added). [[redacted].]

Given the level of discovery that is traditional in regulatory cases, it is reasonable to assume the LECs never thought Qwest would uncover the misconduct. They presented the back-dated contracts and invoices to the FCC as facts, but never presented anything that even suggested the documents were backdated. They withheld the evidence from Qwest in this case, and forced Qwest to file multiple motions to compel. The LECs produced material admitting to the backdating only: (1) after Qwest had obtained documents and deposition testimony from One Rate establishing the back-dating scheme; (2) after the Board issued three orders compelling discovery; (3) subject to protective agreement so Qwest could not take the material to the FCC; and (4) after the date for close of discovery in the *Merchants* case pending before the FCC. *See generally* Exhibit 1356. This conduct cannot be interpreted any way other than the LECs intended to perpetrate a fraud upon Qwest, the FCC and this Board. The OCA – an objective third-party – recognized that the LECs' attempted to "deceive the Board." OCA Brief at 4.

Despite this overwhelming evidence, the Farmers Respondents put forward four excuses to try to pardon their illegal actions. First, they argue that the evidence presented to the FCC showed the invoices were backdated. Second, they argue the evidence they presented to the FCC was truthful. Third, they argue the final contract that Merchants wanted to present to the FCC made clear the contract was back-dated. Fourth, they argue that Merchants may have perpetrated a fraud on the FCC, but they did not attempt to defraud this Board. These arguments are baseless. Again, it is particularly troubling that the Farmers Respondents try to justify their conduct. The Board should hold the Farmers Respondents responsible for their attempt to hide the truth, make it clear that the manufacture of falsified evidence and failure to disclose the truth is serious misconduct, and hold those involved to account.

The Farmers' Respondents first argument is that a review of the invoices shows their FCSC partners failed to pay the invoices, and therefore Qwest should have known the invoices were backdated. Farmers' Brief at 40. This argument is specious. [[redacted]] leaving the very false impression that the invoices were created contemporaneously. The FCC already addresses this issue, and twice stated there was nothing in the record (which included the invoices) to suggest that the invoices and contracts were created in June 2007, years later than the dates contained on the invoices:

> Farmers raises two additional objections to Qwest's Petition and Motion. First, Farmers argues that there is no "new" evidence because Qwest knew, or should have known long before the reconsideration stage of this proceeding that Farmers backdated contracts and invoices.38 We disagree. The contracts and invoices that Farmers produced bear no indication that they were backdated.

Exhibit 1356, Tab * at ¶10. *Id.* at ¶9 ("Farmers produced nothing in our proceeding, however, that indicated that the agreements or invoices were created long after the dates shown on the documents.").

The Farmers Respondents' second argument is that they were truthful with the FCC because they sent invoices to the FCSCs on [[redacted]]. Brief at 36. This is an appalling statement. Merchants' admits that it did not produce any material that would have led Qwest or the FCC to know that the invoices and contracts were backdated. Tr. at 2067-68 & 2074. The Farmers Respondents obviously do not believe in an obligation to tell the whole truth; they believe omission of critical facts is acceptable. Moreover, once again, the invoices and contracts documents produced to the FCC leave the very false impression that they were created at the same time the FCSC service was provided. This argument also ignores that the contract amendments Merchants submitted for [[redacted]] and leave a similar false impression.

The Farmers Respondents' third argument is that Qwest counsel misled Rex McGuire into testifying that Merchants intended to deceive the FCC. Brief at 37-39. This is baseless on its face: no person would ever testify that they intended to falsify documents unless it was true. Moreover, a review of the documents shows this argument fails on its facts for many reasons. First, Exhibit 1356, Tab 23 is a separate stand alone exhibit; Qwest did not detach anything from the document. *See* Exhibit 1221. Second, Merchants never submitted Exhibit 1220 (the second version of the proposed contract addendum with Free Conference) to the FCC, and thus, the FCC remained completely unaware that the contract amendments were backdated. [[redacted].] Fourth, Rex McGuire admitted [[redacted]] Tr. at 2069-70. Fifth, everyone saw the new contract addendum for what it was – an attempt to [redacted]] Exhibit 1221. Even Rex McGuire admitted he knew the material was erroneous on its face:

> [[redacted]]

Tr. at 2073-74. Thus, it is patently disingenuous to argue that Qwest's counsel misled Mr. McGuire when it is so abundantly clear that Merchants attempted to deceive the FCC and in fact did deceive the FCC.

The Farmers Respondents' fourth argument is that they produced all of the evidence related to back-dating in this proceeding, so they had nothing to hide. Brief at 35. This argument ignores that Qwest's original discovery requested the material, and the Farmers' Respondents stated that all of it was "irrelevant." Exhibit 1356, Tab 18. The Board then granted two motions to compel the very discovery the Farmers Respondents claimed was irrelevant. *Id.* at Tabs 20 & 22. Despite that, the Farmers

Respondents fought and refused to produce the evidence. *Id.* at Tabs 24 & 27. Thereafter, [[redacted]]. *See, e.g.,* Exhibit 49 at 154-158 & Exhibit 57. Qwest informed the Board of this fact (Exhibit 1356, Tab 28), and the Board ordered Farmers Respondents to produce the material immediately thereafter. *Id.* at Tab 29. Only then did the Farmers Respondents produce the material. The evidence shows they made every effort to conceal, and then only after they had no choice but to produce, did they actually produce evidence that reflected their backdating. Indeed, their true motives can be seen from what occurred afterwards. After the FCC ruled – based on a record Merchants knew was premised on false evidence – the Farmers Respondents immediately stated that the case was over, and the Board should stay this case. *Id.* at Tab 31. Then, they argued vociferously that Qwest could not take the backdating evidence to the FCC for evaluation on Qwest's petition to reconsider. *Id.* at Tabs 33-34. This is not the way an innocent party behaves: this is how a guilty party with something to hide behaves.

The final argument is that back-dating is business as usual and happens in the industry all the time. This is anything but true. Qwest's Opening Brief cited cases showing that LECs cannot rely upon a claim of "industry norm" to justify the illegal back-dating scheme. *See, e.g., U.S. v. Treacy,* 2008 WL 4934051, 4 (S.D.N.Y. November 19, 2008). Farmers cites *In re Exchange of Transit Traffic, Proposed Decision and Order*, Dkt. No. SPU 00-7, 2001 Iowa PUC LEXIS 548 *46, *50 (2001), but the Board's decision affirming that proposed order expressly recognizes that the industry practice of back billing is limited to computational billing errors. *In re Exchange of Transit Traffic*, 2002 WL 535299, 8 (I.U.B. March 18, 2002). The back dated invoices here were not submitted to correct computational errors; they were submitted in conjunction with backdated contracts that stated they were [redacted]], and in contravention of terms in confidential contracts with FCSC partners, in an effort to give the false impression the FCSCs were purchasing local exchange services.

None of the cases cited by Farmers' regard backdating to mislead regulators and other parties.[7] When this occurs – and this is precisely what Merchants, I35, Dixon and Reasnor did – the law uniformly states that such backdating is fraudulent. *See, e.g., Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (plaintiff's claims dismissed because plaintiff had manufactured a backdated agreement which he had the other contract party sign to support plaintiff's claims); *U.S. Small Business Admin. v. Smith Stratton, Wise, Heher & Brennan, LLP,* 2009 WL 323211, 5 (E.D.Pa. Feb. 6, 2009) ("although the written consulting agreement asserted by ACI Defendants is dated November 22, 1999, the evidence shows that this document was created in late 2000, after the fees were actually disbursed. There is evidence from which a fact finder could determine that the agreement was purposefully backdated to deceive the SBA and auditors."); *Rivet v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 614766, 1 -2 (6th Cir. 2009) (unofficially published) (misrepresentations included backdating of settlement agreements); *Ryan v. Gifford,* 918 A.2d 341, 345 (Del.Ch. 2007) (backdating of option grants to manipulate value and make it appear to shareholders that options were granted at market value instead of manipulated, is fraudulent); *Wolfe v. GC Services Ltd. Partnership-Delaware,* 2009 WL 230637, 7-9 (E.D. Mich. 2009) (collecting cases, dismissed claim because plaintiff fabricated call log to support claims); *In re Restaurant Development Group, Inc.*, 396 B.R. 717, 725 -726 (Bkrtcy.N.D. Ill. 2008) (if contract was backdated, would show fraudulent intent toward creditors).

The Board should recognize the backdating for what it was – an attempt to create a false impression; an attempt to deceive; an attempt to defraud; an attempt to obtain an order from the FCC

[7] The Farmers Respondents argue contract law allows stipulations of prior effective dates, and claims this absolves its backdating. Brief at 33-34. The cited cases regard non-fraudulent reasons for prior effective dates – to reduce to writing an oral understanding on which the parties have performed, ratify a previous oral agreement, modify terms to comply with the law, or simply to change a deal as between themselves. *C.T. Massey v. Exxon Corp.*, 942 F.2d 340, 344 (6th Cir. 1991); *Viacom Int'l v. Tandem Productions, Inc.*, 368 F. Supp. 1264, 1269-70 (S.D.N.Y. 1974), *aff'd* 526 F.2d 593 (2nd Cir. 1975); *Matthews v. Jeremiah Burns, Inc.*, 129 N.Y.S.2d 841, 847 (N.Y. Sup. Ct. 1954); *Sweetman v. Strescon Industries, Inc.*, 389 A.2d 1319, 1321-1322 (Del. Super. Ct. 1978). *Moore v. Comm'r of Internal Rev.*, 93 T.C.M. (CCH) 1275 *44, expressly distinguishes fraudulent backdating. *Moore v. C.I.R.*, 2007 WL 1555852, 15 -16 (U.S.Tax Ct. 2007). *See also Johnston v. Box*, 453 Mass. 569, 2009 WL 962294, 7 (Mass. April 13, 2009) (distinguishing late ratification from backdating to manipulate). These cases are thus inapposite.

under false pretenses; and, an attempt to cover-up the fact that the FCSCs were partners, not end-users.

V. THE LECS' RELIANCE UPON THE FCC'S *FARMERS AND MERCHANTS* DECISION AND *JEFFERSON* PROGENY IS SPURIOUS.

A. The Board Should Summarily Reject the LECs' Reliance Upon the FCC's *Farmers and Merchants* Decision – a Decision Under Express Reconsideration.

Every LEC Respondent relies heavily upon the FCC's decision in *In re Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, 22 FCC Rcd 17973, FCC 07-175 (rel. Oct. 2, 2007), partial reconsideration and further proceeding granted, 23 FCC Rcd 1615, FCC 08-29 (January 29, 2008). All of their briefs are replete with references to this decision wherein the LECs argue the FCC establishes that the FCSCs are end-users and that revenue sharing schemes are legal. They make these arguments despite knowing and without acknowledging the evidence in this case shows that decision was procured by Merchants' fraud. They make these arguments despite knowing the fraudulent evidence caused the FCC to reconsider. They make these arguments despite the fact that the FCC's reconsideration decision cited 47 C.F.R. § 1.106 and thus expressly held the decision was not final:

> If the Commission or designated authority initiates further proceedings, ***a ruling on the merits of the matter will be deferred pending completion of such proceedings.*** Following completion of such further proceedings, the Commission or designated authority may affirm, reverse, or modify its original order, or it may set aside the order and remand the matter for such further proceedings... as may be appropriate.

47 C.F.R. § 1.106(k)(2) (emphasis added). *See also Verizon Maryland Inc. v. RCN Telecom Services, Inc.*, 232 F.Supp.2d 539, 549 -550 (D. Md. 2002) (no preclusive effect in commission's first order finding parties' intent in interconnection agreement, because the commission entered a second order that reconsidered the issue) (citing *McGowen v. Harris,* 666 F.2d 60, 65 (4th Cir. 1981)). *Cf.*, *Alabama Mun. Distributors Group v. FERC,* 312 F.3d 470, 474 (D.C. Cir. 2002) (administrative decisions that are not appealable have no preclusive effect for future litigation). Finally, the LECs make these arguments despite knowing that every court to consider the argument has held the decision is not yet final. Most recently, the South Dakota District Court held:

> [T]his Court is not convinced that FCC's October 2, 2007 decision in *Farmers & Merchants* is at this time properly characterized as settled precedent. Although more than five months have passed since Qwest submitted its amended petition, this Court believes it is as likely that the passage of time indicates that the FCC is in some way modifying its *Farmers and Merchants* decision as it is that the FCC has determined that the decision will remain unmodified without having issued an order stating the same.

Sancom, Inc. v. Sprint Communications, 2009 WL 903720, Civ. No. 07-4107-LLP (D.S.D. March 30, 2009). The LECs' reliance upon this decision has no basis in law or fact and once again shows that those involved in traffic pumping are willing to make any argument – no matter how baseless – to try and justify the millions of dollars in improperly assessed access charges.[8] The Board should make its decision without reliance of any kind upon the FCC's October 2, 2007 decision.

B. The LECs' Reliance Upon the FCC's *Jefferson* Decision is Equally Misguided.

The LEC all uniformly cite *AT&T Corporation v. Jefferson Telephone Company*, 16 FCC Rcd 16130 (2001), and claim this decision and its progeny show the FCC has already found traffic pumping schemes are legal. Nothing could be further from the truth, as a simple reading of the case shows. In that case, AT&T limited its argument to issues raised in a 1996 NPRM and in a "1995 advisory letter issued by the Chief of the Enforcement Division." *Id.* at ¶13.[9] The FCC rejected these two arguments, but stated that the decision was incredibly narrow:

> Although we deny AT&T's complaint, we emphasize the narrowness of our holding in this proceeding. ***We find simply that, based on the specific facts and arguments presented here***, AT&T has failed to demonstrate that Jefferson violated its duty as a common carrier or section 202(a) by entering into an access revenue-sharing agreement

[8] This decision also makes one additional important point. The LECs argue that the filed rate doctrine saves them from themselves, i.e., that even if they committed fraud on the marketplace, the FCC and the Board; even if their relationships with FCSCs were premised upon illegality; and even if the Board believes all of the evidence Qwest presented, the filed rate doctrine salvages their charges and the only remedy is for the Board to order the LECs to require the FCSCs to pay for the services they received. As Qwest set forth above, that is not the law. Moreover, if the law were as simple as the LECs claim, the FCC would not have needed to reconsider. The FCC would have simply made this finding in January 2008. Of course, they did not make this finding, thereby showing the argument is without basis.

[9] AT&T relied upon these exact arguments in each of cases in the *Jefferson* line. *See In re Total Telecommunications Services, Inc. et al. v. AT&T Corp.*, 166 FCC Rcd 5726 (2001), *aff'd in relevant part, AT&T Corp. v. FCC,* 317 F.3d 227 (D.C. Cir. 2003), *In re AT&T Corp. v. Beehive Telephone Company, Inc., et al,* 17 FCC Rcd 11641 (2002).

> with an end-user information provider. ***We express no view on whether a different record could have demonstrated that the revenue-sharing agreement at issue in this complaint (or other revenue-sharing agreements between LECs and end-user customers) ran afoul of sections 201(b), 202(a), or other statutory or regulatory requirements.***

Id at ¶16 (emphasis added). Indeed, the FCC specifically stated that no one alleged that Jefferson discriminated by treating its conferencing partner different than true end-user customers. *Id.* at ¶15. In other words, the *Jefferson* decision did not address any of the questions at issue before the Board in this proceeding. The LECs' argument to the contrary is an attempt to read more into the decision than exists. No matter how many times the LECs say "*Jefferson*" and "*Farmers and Merchants,*" it does not change the unalterable fact that these decisions do not help them in the slightest.

The Farmers Respondents even go so far as to claim that they relied upon the *Jefferson* decision as a precondition for entering into the traffic pumping scheme. Brief at 6 ("In light of this precedent... they had no reason to believe that the proposals were any way improper"); 60 (LECs "entered into contracts in reliance upon FCC precedent finding such arrangements to be lawful."). These assertions are utterly without factual support. The LECs do not cite any evidence for the proposition that they relied upon *Jefferson.* Qwest has searched the entire transcript for the word "Jefferson" and nowhere do any of the Farmers Respondents claim or even suggest they relied upon *Jefferson.* Jim McKenna, Aventure's President, implied he had so relied, but quickly recanted that testimony on cross-examination:

> Q. ... [Y]ou mentioned the Jefferson decision in your testimony; correct?
> A. Probably.
> Q. You didn't even get a copy of the Jefferson decision until after the lawsuit began, did you?
> A. Oh, I'm sure I had it before that.
> Q. Well, let's look at your deposition, page 137.
> A. What page was that?
> Q. 137. "Question: ... "Before beginning to enter into the agreements with free calling parties did you or someone else on behalf of Aventure who was not a lawyer review or re-review the Jefferson decision?
> "Answer: No.
> "So when you said you had a copy of the Jefferson decision, might it be something that you had just gotten in the last month or so before you sent it to him?"
> And that's to your counsel here. And you said "correct."
> A. I stand corrected.

Tr. at 2288-89. Thus, the only person who even suggested reliance, admitted he had not so relied. Moreover, Qwest thought the LECs might try to erroneously argue that they, or their counsel, relied upon *Jefferson*. As a result, Qwest propounded discovery asking the LECs to describe "the advice" they had received "relating to revenue sharing." Exhibit 1356, Tab 26 at 11-13. In response, the Farmers Respondents admitted they did not rely upon advice from lawyers before entering into their illegal traffic pumping schemes. Farmers Respondents' August 6, 2007 Surreply at 3-4.[10] Thus, the evidence shows that Farmers' argument that they relied upon *Jefferson* is completely untrue. Finally, if an objective person had read *Jefferson*, they would have known they could not rely upon it.[11] Reliance upon prior precedent must be good faith reliance, and *Jefferson* does not provide anything upon which to rely. *See, e.g., Markowski v. SEC,* 34 F.3d 99, 105 (2d Cir.1994) ("To invoke this principle, [a party] has to show that he made complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith.").

C. The FCC's Other Decisions Do Not Support the LECs' Arguments.

The LECs also rely on the remaining decisions that are part of the *Jefferson* progeny; specifically, the *Total, Frontier and Beehive* decisions. All of these decisions suffer from the same problems as *Jefferson*: AT&T raised the same narrow issues, and the issues before the Board in this case were never raised. For example, in *AT&T v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041; 2002 FCC LEXIS 1005 (Feb. 27, 2002), the FCC states, "[t]he issues raised in this Complaint are identical to those raised and denied in *AT&T Corp. v. Jefferson Telephone Co.*" Likewise, *In re AT&T Corp. v. Beehive Telephone Company, Inc., et al,* 17 FCC Rcd 11641 (2002), was a challenge to Beehive's

[10] The Board has taken official notice of the file in this proceeding. See *infra*, Section X.

[11] For as much as the LECs cite *Farmers and Merchants*, it is worthy of note that they do not mention that the FCC specifically stated that any reliance upon the *Jefferson* line of cases is without merit. Exhibit 1356, Tab 30, page 14, n. 115 ("We also find inapposite a number of cases cited by Farmers to suggest that the Commission has already found it lawful to impose access charges for the type of service at issue here… [citing Jefferson].").

proposed switched access tariff rates. The FCC found it "patently meritless" for Beehive to argue that the that filed rate doctrine saved them to the extent the calls in question failed to comply with their access tariffs. *Id.* at ¶11, n.37. ("Beehive alleges that the Filed Rate Doctrine bars AT&T's claim of overcharges based on charges for uncompleted calls. .... This defense is patently meritless. To the extent that Beehive billed AT&T in violation of its Tariff and the Act, the Filed Rate Doctrine provides no shelter."). The FCC then found that Beehive's revenue sharing violated Section 201(b) of the Act by generating excessive returns. *Id.* at ¶27. The *Total* case has a unique twist; however, that twist benefits Qwest. The Farmers Respondents primarily rely on *Total* to argue that the IXCs should pay access charges even though the LECs' services are not covered by their access tariffs. Farmers fails to note that the D.C. Circuit overturned the FCC's conclusion for lack of factual basis showing the LEC had actually performed access service. *AT&T Corp. v. F.C.C.*, 317 F.3d 227, 239 (D.C. Cir. 2003); *settled on remand,* 18 F.C.C.R. 11,533 (Jun 12, 2003).[12] These decisions provide no support whatsoever to the LECs.

VI. GIVEN HOW FEEBLE THE LECS' LEGAL ARGUMENTS ARE, THE LECS RESORT TO MISREPRESENTING FACTS AND LAW IN AN EFFORT TO JUSTIFY THEIR CONDUCT.

The LECs take wide liberties with the facts and law on virtually every argument they make. The number of inaccuracies abound. Qwest will not attempt to point out each and every misstatement. Instead, Qwest will point out several to make its point, and refers the Board to its Opening Brief which sets forth the actual facts in some detail. Qwest also notes that if the LECs make a claim the Board does not recall from the record, that is probably because they are taking something out of context and the Board should review the actual record cite for the point.

A. Farmers' Argument that the FCC Already Found Traffic Pumping Does Not Discriminate Between End-Users is Inaccurate.

[12] The Farmers Respondents also cite the 2007 FCC decision that required ILECs to meet certain requirements to opt out of the NECA pool. Brief at 46. They argue this decision shows the FCC has never signaled that traffic pumping violates the law. Given the facts in the record, this argument is in colloquial terms: "a tariff is a license to steal, until the FCC tells you it isn't." The Farmers Respondents cannot reasonably contend that it needs the FCC to "signal" that it is unlawful to charge switched access rates in violation of their own tariffs. The filed rate doctrine has found this illegal for almost 100 years.

The Farmers Respondents argue that the "the FCC has held that the sharing of revenues for marketing efforts does not constitute discrimination." Brief at 10. They misrepresent that the FCC dealt with this issue in its *Jefferson* decision. *Id.* at 68. A plain reading of the decision shows otherwise:

> AT&T cursorily contends that Jefferson discriminated against its end users, in violation of section 202(a) of the Act, by failing to use all of its access revenues to maintain its network. AT&T's contention fails to state a discrimination claim under section 202(a), because AT&T fails to allege that Jefferson treated one customer differently from another. Notably, AT&T fails to allege either that (i) ***Jefferson offered a better deal to IAN than to other similarly situated end-user customers***, or (ii) Jefferson treated one IXC differently than others in its provision of interstate access services. AT&T simply argues that Jefferson's network as a whole could have been better, had Jefferson not shared revenues with IAN. Whatever claim this odd argument may state, it is not one under section 202(a)....

Exhibit 1354 at ¶15 (emphasis added; footnotes omitted). In other words, AT&T argued that Jefferson's conduct made it difficult for AT&T to provide adequate service to its end-users and claimed this forced AT&T to discriminate. As the FCC stated specifically, AT&T did not argue that Jefferson discriminated between end-users. This is Qwest's exact point. To the extent the Board finds the FCSCs to be end-users (a point Qwest disputes), then by definition the LECs are discriminating between end-users. The FCC never addressed this issue, as any fair reading of the *Jefferson* decision shows.

B. Farmers' Argument That the FCC Already Found LECs Can "Net" for Local Service is Inaccurate.

The Farmers Respondents also argue that the FCC already found it acceptable for LECs to net payments for local service, citing to the *Farmers and Merchants* decision. Brief at 22, n. 8. Once again, this seriously misrepresents the decision. In *Farmers and Merchants*, Merchants misrepresented facts and argued that the FCSCs had made payments to them for local services per tariff. Qwest thus argued that it was impossible for the FCSCs to be end-users if the amounts the LECs paid to the FCSCs exceeded the amount the FCSCs paid to the LECs. Exhibit 1356, Tab 30 ¶38.[13] The FCC simply finds that a "net

[13] Thus, this aspect of the decision stands for nothing more than, for example, to the extent that Qwest's legal counsel subscribes to Qwest's local exchange service, receives invoices, and pays those invoices,

payment" is not required; it did not go further to find that LECs could net charges under their local exchange tariffs, nor did it find that Merchants had netted such payments.

C. Many LECs Misrepresent Facts or Law Relating to the Requirement that Calls Be Delivered to an End-User Premises for Switched Access to Apply.

The LECs arguments about the end-user premises requirement are all over the map. The Farmers Respondents cite to the definition of premises from the local exchange tariff, but ignore the definition from the access tariffs. Brief at 26. As Qwest's Opening Brief shows, the access tariffs uniformly state "[t]he term "Premises" denotes a building or buildings on continuous property (except Railroad Right-of-Way, etc.) not separated by a public highway." *See generally* Exhibits 35-48. Thus, the calls in question must be delivered to an end-user's "building or buildings." None of the FCSCs have a building or buildings anywhere in Iowa. Thus, none of the calls were delivered to an end-user "premises;" instead, the LECs delivered the calls to their own premises.

The Superior Respondents cite to irrelevant virtual collocation rules to claim the FCSCs are collocating in the LECs' central offices. Brief at 23-24. By making this argument, the Superior Respondents seem to tacitly agree that the FCSCs must have some control over the "premises" for there to be end-user premises at all, which they conceded is necessary for switched access charges to apply. *Id.* at 23. Superior attempted to make this same point in hearing by citing to an excerpt from an FCC's First Report and Order. Exhibit 705. However, on redirect, Mr. Owens explained the fallacy of the argument:

[Q[redacted]

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the fact that Qwest pays its legal counsel more for legal fees than the lawyer does for telephone service, has no effect on the lawyer's end-user status.

[redacted]

Tr. at 865-68.[14] The point is that the FCSCs had no ownership or control over the location where the bridges were located. In virtually every instance, the FCSCs never even visited the location where the equipment was located. Instead, the LECs owned and controlled their central offices where the FCSCs' equipment is located, and the FCSCs operated from a variety of out of-state locations (*e.g.*, Las Vegas, Los Angeles, San Diego, Houston, and elsewhere). Thus, the FCSCs have no premises in Iowa.

Finally, Reasnor argues that the FCC "rejected a narrow definition of premises" in the access tariffs. Brief at 21. Reasnor fails to mention that the FCC adopted the exact definition for premises that is contained in the access tariffs issue in this proceeding. As Mr. Owens explained:

> However, the portion of the order cited by Mr. Zingaretti simply rejects a proposed definition because that definition would:
>
> > "unreasonably restrict a premises to a building occupied by a single IC or end user who uses it as a place of business or residence. No support has been provided for such restrictions. This definition must be replaced by the traditional language provided in this discussion, above."
>
> The definition adopted by the FCC, was: "a building or buildings on continuous property (except railroad right-of-way, etc.) not separated by a public highway."

Exhibit 1275 (Owens Rebuttal) at 121-22. Qwest is not arguing that a premises must be occupied by one single end-user; to the contrary, Qwest admits that apartment complexes, etc. satisfy the definition of premises. The issue is whether the FCSCs "controlled" the premises. Thus, Reasnor ignores the crucial

[14] The Superior Respondents cite 47 C.F.R. §§ 51-321(b)(1) and 51-323(a) for their view; however, these rules merely state that BOCs must provide virtual collocation. They state nothing about the required aspects of virtual collocation.

point: its FCSC partner, One Rate Conferencing, does not satisfy the tariff definition of premises because it does not have a building in Iowa and does not control any aspect of a building in Iowa; therefore, no premises exists. Indeed, [[redacted] It is impossible for Reasnor to meet the definition of premises.

D. The Facts Show Beyond Any Question That Much of the Traffic in this Case Does Not Terminate in the LECs' Certificated Exchanges as Required By Access Tariffs, Local Tariffs and Common Law.

Qwest's Opening Brief shows that much of the traffic in question does not terminate in the LECs' certificated exchange, and therefore does not qualify for switched access charges on this basis alone. Brief at 49-61. Qwest established that all of the traffic for Superior, Great Lakes, Reasnor and essentially all of Riceville's traffic did not terminate in their certificated exchanges; instead, these carriers "laundered" the traffic making it appear the traffic was terminated in one exchange, when in reality it was terminated in another. In addition, most of the LECs (Riceville, 135, Aventure, Great Lakes and Superior), participated in credit card or international calling where calls merely routed through the exchange without terminating. None of these facts are in dispute. As such, the Board should find that the LECs did not "terminate" the traffic and therefore "terminating" switched access charges cannot apply.

The LECs respond to charges of traffic laundering in different ways. Riceville argues that Riceville had no choice but to terminate the calls in Rudd. Brief at 28. In other words, Riceville admits the calls terminated in Rudd, a location where Riceville is not certificated, and therefore it could not have been providing local exchange service (a requirement to charge switched access) to its FCSC partners. Tr. at 1869-1870, 1884-1890. This is fatal to Riceville; the complete lack of authority Riceville posits for this point makes Qwest's point. Superior and Reasnor both try and overcome their failure to terminate calls by arguing they were providing their FCSC partners with some bizarre variation of "foreign exchange" service. Superior Brief at 16; Reasnor Brief at 7. As stated in Qwest's Opening Brief, there is not one shred of evidence any LEC was providing FCSCs with foreign exchange. Indeed, all of the evidence shows they were not. Neither Reasnor nor Superior[15] had a direct relationship with any FCSCs; the FCSCs did not even know these LECs existed; no FCSC ever requested (orally or in writing) foreign exchange; the service obtained by the FCSCs did not satisfy the local exchange tariff requirements of foreign exchange;[16] no bills (not even back dated bills) ever made reference to foreign exchange; Superior had no physical facilities connecting it directly to Great Lakes; and the concept of foreign exchange never even came up until expert witnesses suggested it years after the fact. The Board should see this for what it is: a misrepresentation to try to justify millions of dollars in illegal switched access charges.

The LECs also take different approaches to the international and credit card calling, in which the LECs or FCSCs convert the calls into VOIP and deliver them to their actual destination in a different state or country. Superior and Farmers state that these calls terminate at the router where the calls were converted into VOIP and sent to their ultimate destination. Without citation to any authority, the Farmers Respondents argue that the FCC's end-to-end analysis does not apply. Brief at 30-31. However, the end-to-end cases apply to this exact scenario. *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs.*, 20 FCC Rcd. 4826, ¶ 26 (2005) ("even if there are multiple communications, the Commission has found that neither the path of the communication nor the location of any intermediate switching point is relevant to the jurisdictional analysis"). In contrast to the arguments of the other LECs, Aventure agrees with Qwest on this point and states that the calls do not terminate at the router. Brief at 2-3. Thus, Aventure is diametrically opposed to the other LECs on this point, and of course, Aventure takes this position because its routers are in Sioux City, which would (by its own admission) eviscerate its claim to the rural exemption.

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[15] Superior argues that its expert, Lawrence Chu, claimed the service was foreign exchange. Brief at 15. However, Mr. Chu admitted [[redacted]. Tr. at 2611-16. Under the filed-rate doctrine, therefore, by definition it cannot be foreign exchange service. Superior in its Brief in fact does not even acknowledge the existence of the broker, Clear Link, who was the middle-man between Superior and the FCSCs.

[16] As stated above, the filed rate doctrine applies to the rates, terms and conditions of a tariff. Given that the services Reasnor describes with One Rate, and Superior describes with its FCSCs do not satisfy the terms and conditions of foreign exchange, by definition, the filed rate doctrine bars the Board from finding it is foreign exchange.

The divergent views make Qwest's point: the LECs are willing to make any argument to try and salvage their ill-gotten gains. It does not matter if they believe the argument; it does not matter if the argument contradicts their brethren; it does not matter if the facts support the argument; it does not matter if the argument is internally inconsistent; it does not matter if the argument is premised upon manufactured evidence or perjured testimony: they will simply say or do whatever is expedient at the time. This mentality is at the core of traffic pumping and shows, beyond any question, just how pernicious the scheme is.

E. Great Lakes Misrepresents That It Had State-Wide Certification and that Certification is Not Required by Law.

It is now undisputed that 100% of Great Lakes services were provided to FCSCs out of the Spencer exchange where Great Lakes is not certificated. Moreover, Great Lakes local exchange tariff does not state it provides service in Spencer; it only references the Lake Park and Milford exchanges. Exhibit 47 at § A(1)(b); Tr. at 2623. The Board's rules specifically state that LECs can only "provide telephone service to the public ***in its service area*** in accordance with its rules ***and tariffs on file with the board***." 199 IAC 22.1(5) (emphasis added). Thus, Great Lakes' provision of service to FCSCs in Spencer violates Board rule, its own certificate, and its own local exchange tariff. Great Lakes attempts to overcome this problem by stating that according to FCC rule, CLECs are not required to file access tariffs. Brief at 36-37. Not only is the FCC's access rule irrelevant, Great Lakes' argument ignores the Iowa statute that requires CLECs to file local tariffs:

> A competitive local exchange service provider shall not be subject to the requirements of this chapter, except that ***a competitive local exchange service provider shall obtain a certificate of public convenience and necessity*** pursuant to section 476.29, ***file tariffs*** ... pursuant to section 476.2, subsection 4, and sections 476.9, 476.10, 476.16, 476.102...

Iowa Code § 476.101(1) (in relevant part). *See also* 199 IAC § 22.14 (requiring filed access tariffs).

In response, Great Lakes argues that the Board should ignore this certification requirement because Qwest purportedly did not raise the issue until the hearing. As an initial matter, Great Lakes made this same argument prior to the hearing and the Board rejected it. November 26, 2008 Order.

Moreover, Great Lakes' argument that it lacked due process notice that its certification was at issue in this proceeding is groundless. The pleading standard applicable to a contested administrative hearing is: "[a] short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished." Iowa Code § 17A.12(d). "[D]ue process requires that a party be informed somehow of the issue involved in order to prevent surprise at the hearing and allow an opportunity to prepare.... The test is fundamental fairness, not whether the notice meets technical rules of common law pleading." *Larson Mfg.*, 2009 WL 349578 at 6 (internal quotation marks omitted). "It is fundamental, even where the rules of pleading apply, that a variance between pleading and proof is immaterial unless the complaining party establishes that he was thereby misled to his prejudice in maintaining his cause of action or defense." *Coghlan v. Quinn Wire & Iron Works*, 164 N.W.2d 848, 851 (Iowa 1969) (quoted in *e.g., Oscar Mayer Foods Corp. v. Tasler,* 483 N.W.2d 824, 828 (Iowa 1992)).[17] "Ordinarily, all that need be shown to validate administrative proceedings against persons who participate in a contested case hearing is that they had a reasonable opportunity to know of the claims which affect them and to meet those claims." *Alfredo v. Iowa Racing and Gaming Com'n*, 555 N.W.2d 827, 833 (Iowa 1996) (internal quotation marks omitted). *Cf., LTDS Corp. v. Qwest Corp.*, 2005 WL 389133 *3-4 (Feb. 2, 2005) (in determining LTDS had not pled claim for breach of contract damages by raising for first time in post-hearing briefs, the Board reviewed the petition, prefiled testimony, opening statement at hearing, and evidence at hearing).

Great Lakes also ignores the express allegations of the complaint, discovery on the issue, and Mr.

[17] The cases that Great Lakes cites as supporting its due process argument are inapposite. *Oscar Mayer Foods Corp. v. Tasler,* 483 N.W.2d 824, 828 (Iowa 1992), simply states that notice pleading applies in administrative actions, and that the defendant had due process notice of the nature of injury alleged. Similarly, *Solvay Animal Health v. Caster*, 2001 WL 1658774, 2 -3 (Iowa App. 2001), and *Glenn v. Carlstrom*, 556 N.W.2d 800, 804 (Iowa 1996), regard amendments of complaints that cause significant changes in the claims, such that reopening of discovery would be required. In this case, there was no need to amend the complaint because the first claim for relief encompasses such failures to meet tariff and exchange area requirements. *Solvay* and *Glenn* are therefore inapposite. Moreover, the issue was presented long before hearing at the first time Qwest could raise the issue.

Owens' pre-filed testimony. In the complaint, Qwest's first claim for relief argues that the LECs (including Great Lakes) billed Qwest access charges for calls that did not meet the requirements of their access tariffs. Respondents are prohibited from charging Qwest terminating access for calls that do not terminate in their local exchange territory. Exhibit 1 at 110-11. This claim is adequate by itself to place certification at issue. Moreover, Qwest's Complaint is explicit that the LECs were billing for services that did not terminate in their certificated exchanges.

> The FCSCs connected their equipment (on information and belief, such as an intelligent voice response system) to the LEC Respondents' network facilities. On information and belief, in many if not all instances, the FCSCs' voice recognition equipment is actually *located outside of the Respondents' service territories.*

Complaint ¶31 (in part; emphasis added). Accordingly, Qwest did plead a claim based on Great Lakes' provision of services outside of its service territory. Moreover, the Board's Order that allowed the complaint to proceed "docket[ed] QCC's complaint pursuant to the statutes and rules cited therein and establish a procedural schedule ***for an investigation of these issues and any others that may develop during the course of this proceeding.***" May 25, 2007 Order at 13 (emphasis added). The Board's Order is consistent with the law. *See, e.g., AT&T Communs. of the Midwest, Inc. v. Iowa Utils. Bd.*, 687 N.W.2d 554, 559 (Iowa 2004).

Qwest also raised the issue about Great Lakes certification as soon as it was able – in Mr. Owens' rebuttal testimony. Exhibit 1275 at 72. Qwest did not raise the issue sooner because Mr. Nelson (Great Lakes' owner) testified erroneously under oath in deposition that Great Lakes was authorized to provide local exchange service throughout the state of Iowa. Exhibit 1 (Owens Direct) at 265. Qwest did not have any information otherwise as it prepared its direct testimony. *Id.* Qwest later learned, upon obtaining a copy of Great Lakes' LEC certificate from the Board, that Mr. Nelson's statement was incorrect. Thus, Qwest did not "sand bag" as Great Lakes claims; instead, Great Lakes misled Qwest about the facts. ***The true reason Great Lakes wants this issue stricken is because they know it decimates Great Lakes' claim for access charges.*** Great Lakes' expert admitted [[redacted]

[redacted].] Tr. at 2627-28. Mr. Chu recommended that Qwest bring the issue before the Board. *Id.* That is exactly what Qwest has done.

Great Lakes also argues that its provision of service outside of its certificated area was merely a technical defect, that it had a good faith belief it was certificated for all Qwest exchange areas, and that the Board should treat Great Lakes' tariff as if Great Lakes had been certificated in Spencer, where it delivered its FCSC traffic, citing several federal cases. Great Lakes Brief at 20-22. None of those cases actually supports Great Lakes' contention. The "technical defect" doctrine, *e.g., Norwest Transp., Inc. v. Horn's Poultry, Inc.*, 23 F.3d 1151, 1153 -1154 (7th Cir. 1994), and *Security Services, Inc. v. K Mart Corp.*, 511 U.S. 431, 442-443 (1994), is narrowly applied to technical defects such as a name change. *In re Americana Expressways, Inc.*, 133 F.3d 752, 757 -758 (10th Cir. 1997). The doctrine does not apply to substantive requirements, such as where the carrier did not comply with a requirement for filing a power of attorney to opt into another carrier's tariff. *Id.*; *Trans-Allied Audit Co., Inc. v. I.C.C.*, 33 F.3d 1024, 1033 (8th Cir. 1994); *MacLeod v. I.C.C.*, 54 F.3d 888, 889-890 (D.C. Cir. 1995) (commission acted reasonably in finding no tariff had been filed, when carrier waited years after incorporating, before adopting tariff). Great Lakes' failure to obtain certification in the Spencer exchange is clearly substantive, as the Board itself recognized during the hearing.

Great Lakes also claims that its purported "good faith belief that a party's actions were in conformity with the applicable regulations" saves it, citing *U.S. v. Sebring Homes Corp.*, 879 F. Supp. 894, 898-899 (N.D. Ind. 1994). However, that case concerns the standard for applying alter ego liability, not a question of tariff or certificate compliance. Finally, the Department of Energy allows for "prompt, good faith" efforts to correct a lack of necessary certificates. In *Johnson Oil Co., Inc. v. U. S. Dept. of Energy*, 690 F.2d 191, 201 n.13 (Em. App. 1982), the court found the applicant did not meet this standard because (as here) the applicant was aware it lacked the required certificates and did not seek to correct the situation. The Board does not have such a savings provision and even if it did, Great Lakes does not point to any action that it has taken to correct its lack of certification after the issue arose in this proceeding. These cases accordingly are irrelevant. The law is plain: Great Lakes must have a certificate for the Spencer exchange to provide the service it billed, and it must have tariffs that identify and cover the Spencer exchange. It has neither.

F. Reasnor Invents a Set of Facts With No Basis In Reality to Try and Justify Its Misconduct.

Reasnor argues that it provided foreign exchange service to One Rate Conferencing from its local exchange tariff and therefore is entitled to switched access. This story ignores the plethora of facts that shows this is impossible. As Reasnor admits, Reasnor did not provide foreign exchange unless the rates, terms and conditions of Reasnor's local exchange tariff are satisfied. Brief at 22 (filed rate doctrine applies to all the terms of a tariff, not just the rates). Reasnor does not come anywhere close to meeting the requirements for foreign exchange as set forth in its local tariff. The local tariff requires that the customer apply for service. One Rate never requested foreign exchange service; indeed, One Rate [[redacted]. Exhibit 1344 (Scholten Depo.) at 82-83. Before the Reasnor exchange was sold to Gary Neill, [[redacted]]. *Id.* [[redacted]]. Moreover, both the Sully and Reasnor tariffs require that, for foreign exchange, the purchaser (purportedly One Rate) obtain local exchange service from both Reasnor and Sully. Exhibit 1364, Sully Telephone Association Telephone Tariff, Part V, Sheet 6, Foreign Exchange Service, ¶D.3. This never occurred; even the back dated invoices that try to fabricate a foreign exchange service do not satisfy this requirement. Arie Scholten stated that [[redacted]]. Exhibit 1344 (Scholten Depo.) at 75. At the outset of this case, Gary Neill (Reasnor's President) submitted a public affidavit and testified under oath that the calls never left the Reasnor exchange thereby making foreign exchange (which requires calls to be transported out of the exchange) a physical impossibility. Exhibit A (Affidavit of Gary Neill) attached to March 12, 2007 Motion for Summary Judgment. Indeed, no document ever mentions foreign exchange or even suggests foreign exchange. The concept never came up until Sully's expert was deposed in September 2007. The claim of foreign exchange is yet another fabrication (obviously endemic in the traffic pumping community).

Reasnor's misrepresentations do not end with foreign exchange; they continue throughout its brief. Reasnor claims it is entitled to switched access even if One Rate never subscribed to services under the local exchange tariff. Brief at 10. Of course, this assertion is baseless; a plain reading of the tariffs show otherwise. Reasnor admits the filed-rate doctrine requires it to follow its tariffs, and its tariff defines "switched access service" as follows:

> Switched Access Service, which is available to customers for their use in furnishing their services ***to end users***, provides a two-point communications path between a customer designated premises and an ***end user's premises***. It provides for the use of common terminating, switching, and trunking facilities and for the use of ***common subscriber plant*** of the Telephone Company. Switched Access Service provides for the ability to originate calls from an end user's premises to a customer designated premises, and to terminate calls from a customer designated premises to an end user's premises in the LATA where it is provided.

Exhibit 1 (Owens Direct) at 71-72 (quoting Exhibit 35, NECA Tariff No. 5, Section 6.1, Switched Access Service; emphasis added). Given the above, Reasnor admits that calls must traverse a "common line" for switched access to apply. Brief at 17-18. A common line must be ordered under Reasnor's "***local exchange service tariffs***." Exhibit 35 § 2.6, Definitions (Common Line). Moreover, Reasnor's tariff states that the LEC "***will provide*** End User Access Service (EUCL) ***to end users who obtain local exchange*** service from the Telephone Company under its general and/or ***local exchange tariffs***." All of the facts show [[redacted].]

Reasnor's own access tariffs thus do not allow it to charge switched access for the calls in question.

Reasnor then takes its argument to the absurd and claims it is entitled to switched access even if the calls are not delivered to an end-user. Brief at 13. However, as section 6.1 of the tariff (quoted above) shows, termination to an end-user is required. Moreover, the tariff defines "access minute" as: "On the terminating end of an interstate or foreign call, usage is measured from the time the call is ***received by the end user*** in the ***terminating exchange***." *Id.* at 262 (quoting Exhibit 35 (NECA Tariff No. 5) at §2.6 (emphasis added)).[18] Again, the plain language of the tariff refutes Reasnor's argument. The Board itself has already held that calls must terminate to end-users for switched access to apply.

> For these reasons, the proper interpretation of the Board's rule is that access charges can only be collected by local exchange carriers that are actually providing service directly to ***end users, that is, to retail customers***. Any other interpretation would be contrary to the public interest and must therefore be rejected.

In re 360Networks (USA) Inc., 2006 Iowa PUC LEXIS 376, 2006 WL 2558996, Docket TF-06-234 (Aug. 30, 2006) (emphasis added).

Reasnor argues that Section 6.1 of the tariff is overruled by more specific provisions of the tariff. This argument misconstrues the FCC's decision that Reasnor cites for this proposition. *In re Investigation of Access and Divestiture Related Tariffs*, 97 F.C.C. 2d 1082, Appx. D, § 6.1; 1984 WL 251254, 121 -122 (FCC Rel'd Feb. 17, 1984). This decision is the FCC's order upon reviewing the first proposed access tariffs in 1984. The Section 6.1 in the original "ECA" tariff to which the order refers (too lengthy to quote here but contained verbatim in the order), was not written anything like the more polished, organized Section 6.1 in Reasnor's tariff (the NECA F.C.C. Tariff No. 5, adopted by the ITA Tariff). For example the original ECA tariff Section 6.1 began:

> Switched Access Service provides a two-point electrical communications path between the IC terminal location and telephone exchange service locations. Each path is capable of the transmission of voice and associated telephone signals within the frequency bandwidth of approximately 300 to 3000 Hz.
> Switched Access Service provides for the use of common terminating, switching and trunking facilities, and jointly used subscriber plant of the Telephone Company's public switched network by ICs for their use in furnishing their services.

[18] The Respondents' intrastate access tariffs have the identical definition, because most of the Respondents have adopted the ITA Tariff (Exhibit 1 (Owens Direct) at 62, 64), and the ITA Tariff in turn concurs in the NECA Tariff No. 5. *Id.* at 65, 68 (Respondents' intrastate access tariffs generally adopt the language of their interstate tariffs, except re End User Access Service and its EUCL charges, and FUSC charges). See Exhibit 36 (ITA Tariff) at p.3 § 1.1.

Id. The FCC instructed carriers to modify the section to describe what switched access is and, instead of partially duplicating subsequent provisions, to refer to the provisions that would apply to each type of switched access service. The FCC thus did not say what Reasnor argues: that Section 6.1 is for all time, in all subsequent versions, a nearly superfluous provision. Instead, carriers have modified the language to describe exactly what is required for switched access to apply. This filed language is controlling.

G. Aventure and Great Lakes Admit They Do Not Qualify for the Rural Exemption, But Claim Erroneously There is Nothing the Board Can Do About It.

Access charges are traditionally calculated based upon formulas that involve revenues and traffic volumes. Generally, CLECs' access charges must mirror those of the incumbent LEC in the exchange. However, the FCC created an exception to this rule; the rural exemption. The rural exemption states that CLECs who (1) only serve persons residing in areas of less than 50,000 residents, and (2) compete with the resident ILEC for customers in the rural area, can charge NECA Band 8 rates. See Qwest Brief at 80-81. Great Lakes admits it must satisfy these requirements – including that it must compete against Qwest, the incumbent in Spencer – to qualify for the rural exemption. Brief at 4-5. The impact of the exemption is enormous: Great Lakes claimed the exemption and thus charges 5.3 cents per minute, when they would be forced to charge Qwest's rate 0.55 cents per minute (just over ½ cent per minute) if it does not qualify. Thus, Great Lakes is charging 10 times more for switched access than it is entitled to charge, all in the name of its schemes to bilk long distance carriers.

Great Lakes admission that it must "compete" for customers is fatal. The evidence is unequivocal that neither Great Lakes nor Aventure competed for *bona fide* customers. Great Lakes' expert witness admitted that [[redacted]]. Tr. at 2633-24. Likewise, Mr. McKenna admitted Aventure [[redacted]]. Tr. at 2307. But both claimed the rural exemption as if they competed. Moreover, it is impossible for Great Lakes to compete for customers because it has no outside plant (Tr. at 2422), and only serves FCSCs. Tr. at 2422-2423. Great Lakes makes no attempt to serve true customers in Spencer, Iowa – a requirement of the rural exemption.[19]

The rural exemption also requires Great Lakes and Aventure to only serve persons resident in exchanges of 50,000 persons or less. None of the FCSCs actually reside in these rural communities. Great Lakes claims the FCSCs are residents of Spencer by analogizing to a Ford plant that has a facility in a rural area. Brief at 39-40. This analogy makes Qwest's point. If Ford placed a plant in Spencer, Iowa, it would hire people in Spencer, those persons would reside in the general vicinity of Spencer and would pay taxes (state, local, sales and excise), and Ford would have an actual premises in Spencer, Iowa. The relationships Great Lakes and Aventure have with FCSCs do not satisfy any indicia of residency in Iowa, let alone in Spencer, Iowa. Thus, Great Lakes and Aventure serve entities (FCSCs) that do not have any residency in Spencer; the FCSCs have only one residence – at their headquarters in Los Angeles, Las Vegas, San Diego and other large metropolitan areas of more than 50,000 residents.

This leads to the primary argument Great Lakes and Aventure raise on the rural exemption. Great Lakes claims the Board is without jurisdiction to interpret federal statutes. Brief at 38. Aventure more modestly claims that the Board cannot set interstate rates. Brief at 9. As Qwest stated in its opening brief, it does not ask the Board to set interstate rates; instead, it asks the Board to make declaratory findings that Aventure and Great Lakes do not compete with the ILEC for local exchange customers, that Aventure serves customers in Sioux City, Iowa, and that both Great Lakes and Aventure serve customers who have no residence anywhere in Iowa and whose only true residence is in metropolitan areas of greater than 50,000 people. Brief at 83-86. The Board should then find that Great Lakes and Aventure failed to qualify for the rural exemption and that they are acting outside the public interest component of their certifications. These findings do not set interstate rates; they make factual findings within the scope of Iowa law. The Board is fully able to do so. Moreover, the Board is uniquely charged with overseeing

[19] Great Lakes argues that it cannot compete with Qwest to serve providers of conference services. Brief at 41. That is not the standard. As Great Lakes admits, Qwest does not serve any conference providers in Spencer, Iowa. Thus, the rural exemption requires Great Lakes to compete with Qwest for customers it actually serves in Spencer.

the certifications of CLECs in Iowa. It is beyond dispute that the Board has an obligation to oversee the certification of LECs in Iowa (Iowa Code § 476.29(1), (9)), and, among other things, to ensure competition is fair and in the public interest. 199 IAC § 22.1(1). The Board should not allow CLECs to knowingly abuse the rural exemption.

VII. THE LECS WHO PARTNERED WITH FCSCS INVOLVED IN PORNOGRAPHY ARGUE THAT THIS EVIDENCE IS IRRELEVANT; THE PUBLIC INTEREST CRIES OUT TO STOP THIS ABUSE.

Every LEC who partnered with a pornographer – Riceville, Merchants, Dixon, Superior, Great Lakes and Aventure – argue it is irrelevant that some of the calling was indecent communications with adult content. Farmers Brief at 40-41; Superior Brief at 41. Once again, this shows the LECs are willing to say and do anything (no matter how harmful their conduct, even to children) to justify their millions in illegal charges. First, they argue that Qwest admitted the pornographic content was "atmospherics." In making this argument, they miss the point altogether. As Ms. Hensley-Eckert testified, the pornographic nature of the calling goes, in part, to whether traffic pumping is in the public interest. Tr. at 1295-96. The practice in question allows minor children to access pornography without any protections, which violates numerous statutes.

The LECs argue that the federal laws cited by Qwest only apply to 1-900 calling, where the phone company charges a fee.[20] Superior Brief at 42; Farmers Brief at 42. The plain language of 47 U.S.C. § 223 states otherwise. 47 U.S.C. § 223(b)(2). The statute applies to the very conduct in question.

The Farmers Respondents try to justify their conduct by saying they were "unaware" Audiocom and others were providing indecent, adult calling through websites such as "Hot Live Sex Chat." Tr. at 1060. Although they are trying desperately to stick their heads in the sand, the facts show that at least

[20] On this point, Superior misstates testimony. Brief at 42. Superior cites testimony from Ms. Hensley-Eckert about 47 C.F.R. § 64-1508, which applies to call blocking but they ignore 47 U.S.C. 223 and the other laws which go far beyond the language of the rule, and apply to all indecent calling. Ms. Hensley-Eckert made this very point in cross-examination. Tr. at 1297-1300.

Merchants and Dixon were fully aware of the situation.[21] Exhibit 1293 (Hensley Eckert Rebuttal) at 18-19. Moreover, the law places the onus on telecommunications providers to act in good faith to prevent the very type of conduct that occurred here. 47 U.S.C. §223(c)(2). Here, the LECs admit they did nothing, asked no questions, ignored obvious evidence that such calling was going on over their networks, and took no action. They have no defense to this abusive practice.

It is highly troubling that hundreds of millions of minutes of calling at issue in this case is pornographic without any protections for children. This is clearly a matter of public interest protection that the Board should rectify with very strong language.

VIII. THE RELIEF QWEST REQUESTS IS AUTHORIZED AND JUSTIFIED TO REDRESS THE SUBSTANTIAL INJURY THAT RESPONDENTS HAVE INFLICTED ON QWEST.

The LECs argue vociferously that the Board does not have jurisdiction to hear or decide this case because much of the traffic is interstate in nature. Qwest addressed this issue completely in its Opening Brief and will not address it again. Regarding Qwest's requests for relief, the LECs take issue with the accuracy of Qwest's refund requests, alleging that Qwest did no more than estimate the amounts of unlawful charges. As Qwest's Brief shows, Qwest's expert has performed detailed, LEC-by-LEC analysis of the relevant call detail records and the LECs' tariff rates. Exactitude in refunds is not required; reasonable accuracy is what the Board has required. Qwest has more than met that standard.

A. The Board Has Authority to Issue the Full Refunds Qwest Has Requested.

The LECs all appear to recognize the Board has authority to order refunds on the intrastate calls that Qwest delivered directly to the Respondents. However, the Farmers Respondents take issue with the calls where Qwest handed the calls to another IXC for ultimate delivery to the LECs. Brief at 63-65. This argument draws an unsupported distinction between the unlawful charges that Respondents imposed

[21] Riceville argues it terminated service to Audiocom as soon as it learned they were a purveyor of pornography. Brief at 41. The facts show otherwise. Riceville terminated Audiocom at the same time as the other FCSCs because they had to opt back into NECA on June 30, 2007. Tr. at 1980. Riceville's own documents showed millions of minutes of Audiocom traffic each month from November 2006-June 2007. Exhibit 946. Thus, the claim that they terminated Audiocom early is one more misrepresentation of fact.

directly on Qwest, and the same unlawful charges that Respondents imposed on Qwest indirectly through the wholesale vendors. As Farmers recognizes, the Board plainly does have authority to order refunds for "overcharges and illegally collected revenue." Brief at 56 (citing *Mid-Iowa Community Action, Inc. v. Iowa State Commerce Com'n*, 421 N.W.2d 899, 901 (Iowa 1988)). It is irrelevant whether the parties use the term "damages" or "refunds," so long as the relief sought is the return for fees unlawfully charged. *See, e.g., Iowa Elec. Light and Power Co. v. Lagle*, 430 N.W.2d 393, 398 -399 (Iowa 1988) (claims for overcharges based on unreasonable rate or technical regulatory grounds must be brought to the Board); *AT&T Communications of the Midwest, Inc. v. Qwest Corp.*, 2007 WL 293371 (IUB Jan. 12, 2007) (noting refunds are a type of money damages). For example, in *LTDS Corp. v. Qwest Corp.*, 2005 WL 389133 (Feb. 2, 2005), the Board discusses LTDS' request for "damages" on breach of interconnection agreement, without questioning whether the Board had authority to grant such relief (had it been requested prior or during the hearing). Farmers' cites no cases that find the Board loses authority to order refunds simply because the unlawful charges are passed on by a wholesale vendor.

The Farmers Respondents also argue there would be double recovery or a windfall, if all IXCs were awarded refunds without considering the compensation they received under wholesale contracts. Farmers ignores that Qwest's request for refunds only seeks a refund of the charges that were passed on to it under the wholesale contracts applicable to the traffic. See Exhibit 1301 (Devolites Direct Testimony) at 8-9; Exhibit 1340 (Devolites Rebuttal Testimony) at 2-3. There would be no double recovery.

B. The Board Has Jurisdiction to Determine Reclamation of Phone Number Assignments.

The Farmers Respondents also contend that the Board does not have authority concerning the Respondents' use of numbering resources, and goes so far as to claim that Qwest misrepresented the Board's authority. The Board plainly has authority to review how Iowa carriers are using the telephone numbers that have been assigned to them, and to order reclamation when a carrier is not using the telephone numbers in accordance with the FCC's requirements and policies.

> (2) State commissions may investigate and determine whether service providers have activated their numbering resources and may request proof from all service providers that numbering resources have been activated and assignment of telephone numbers has commenced.
>
> * * *
>
> (5) The NANPA and the Pooling Administrator shall abide by the state commission's determination to reclaim numbering resources if the state commission is satisfied that the service provider has not activated and commenced assignment to <u>end users</u> of their numbering resources within six months of receipt.

47 C.F.R. § 52.15(i)(2), (5) (emphasis added). See also Ex. 1359 (ATIS publication) at § 8.0. The Board has previously recognized its authority to order reclamation. *In re Level 3 Communications, LLC*, 2003 WL 22472183, 3 -4 (I.U.B. Oct. 6, 2003). The Board has authority under state law "to inquire into the management of the business of all public utilities, and shall keep itself informed as to the manner and method in which the same is conducted..." Iowa Code § 476.2(4).[22]

In sum, the Board has authority to conclude from the evidence in this case that shows the FCSCs are not end users, that the Respondents have assigned thousands of telephone numbers to FCSC business partners, not "to end users of their numbering resources," as required under 47 CFR § 52.15(i)(5). Likewise, the evidence which shows there are no end user customer premises for the traffic at issue in this case shows that the Respondents fail the requirement (for wireline providers) of assigning numbers for use at customer premises within exchange areas where they are authorized to provide service. Ex. 1359 at §2.14; *In re Sprint Communications Co. L.P.*, 2003 WL 21537472, 8-10 (Iowa U.B. June 6, 2003) (recognizing that carrier must be authorized to provide service in the areas where numbers are requested). *See also Id.* at § 2.1 ("If a resource is sold, brokered, bartered or leased for a fee, the resource is subject to

[22] See, *Third Report & Order & Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, In re Numbering Res. Optimization,* 17 F.C.C.R. 252, 297, (2001) ("[I]n recognition that states can serve a valuable role in helping the Commission to monitor carriers' number use, we clarify that states may conduct audits, at their own expense, to determine whether a particular carrier is in compliance with the Commission's numbering rules to discharge their own responsibilities."); "*First Order, In re Numbering Res. Optimization,* 15 F.C.C.R. 7574, 7606-07 (2000) ("We do not intend, however, to supplant independent state authority exercised pursuant to state law unrelated to number administration."); *Cf., Iowa Telecom. Services, Inc. v. South Slope Co-op. Tel. Co.*, 2007 WL 4039630, 5 -6 (I.U.B. Jan. 23, 2007) (finding Board authority to require Iowa carrier to conform to FCC's requirements for local number porting).

reclamation"). The LECs' abuse of numbering resources in a manner contrary to the public interest gives the Board additional authority to hear Qwest's claims, and authority to rule that the Respondents' FCSC-assigned telephone numbers should be reclaimed.

IX. RESPONDENTS DO NOT SUCCESSFULLY REBUT THAT IF THE FCSCS WERE END USERS, THEN THEY HAVE UNLAWFULLY DISCRIMINATED.

The LECs have plainly discriminated in favor of the FCSCs, and thus if the FCSCs were actually end users of local exchange service (which Qwest contends they are not), then the LECs have violated Iowa Code §§ 476.3 (prohibiting discriminatory charges and practices), 476.5 (charging less compensation than stated in tariff), 476.100(6) (using basic exchange service to subsidize other services), and 199 IAC § 22.1(1)(d) (prohibiting discrimination among customers). None of the Respondents offer any persuasive argument refuting this unlawful discrimination. Superior, for instance, simply argues that the claim cannot apply if Superior did not provide local exchange service to the FCSCs. Brief at 35-36. This makes Qwest's point: either the FCSCs were not end users (thus no access charges can apply) or if they were end users, then the unlawful discrimination is plain.

The Farmers Respondents meanwhile claim that its discrimination was not unreasonable, citing the *Jefferson* decision (Brief at 67), which as Qwest shows above, is a frivolous argument. Farmers fails to persuasively explain why a LEC's provision of services to FCSCs ***for free*** is a reasonable practice. As to the sharing of access revenues – the kickbacks paid to the FCSCs – Farmers claims that these are lawful because there are no other customers that provide "marketing" to the LECs in the way that the FCSCs do. Farmers ignores that it is thereby admitting to paying illegal rebates. "No carrier shall... refund or remit payment by any means or any device any of the charges so specified...." 47 U.S.C. § 203. "The purpose of the anti-rebate provision of the Act is to prevent a carrier from making off-tariff deals with certain customers." *In re AT&T's Private Payphone Commission Plan*, 3 FCC Rcd 5834 ¶¶20-21 (Rel. Oct 3, 1988). Off-tariff deals for a select group of business partners is exactly what happened here.

In sum, the record in this proceeding shows that the LECs – if they had been providing local exchange service to FCSCs as end users, which Qwest contends they were not – unreasonably discriminated in two ways: (1) providing free services to FCSCs; and (2) providing revenue kickbacks to FCSCs. Traffic pumping is therefore premised upon a scheme that violates Iowa law on its very face.[23]

Superior claims Qwest has no standing to complain regarding the discrimination, but this argument contradicts the Iowa statutes and rules:

> ***Any person*** may file a written complaint with the board requesting the board to determine compliance by a local exchange carrier with the provisions of sections 476.96 through 476.100, 476.102, and this section, or any board rules implementing those sections. ...

Iowa Code § 476.101 (emphasis added). Respondents' discrimination in local service is a violation of at least 476.100(6), which prohibits the LECs from "[u]s[ing] basic exchange service rates, directly or indirectly, to subsidize or offset the costs of other products or services offered by the local exchange carrier. Iowa Code § 476.100(6). *See also, id.* at §476.100(7) (a LEC cannot "[d]iscriminate in favor of itself or an affiliate in the provision and pricing of, or extension of credit for, any telephone service."); 199 IAC 22.1(476)(d) ("To ensure that no telephone utility shall unreasonably discriminate among different customers or service categories.").

Qwest meets the general requirements for standing as well.

> [S]tanding to sue means a party must have sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. .... As far as Iowa law is concerned, this means that a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected. .... Having a legal interest in the litigation and being injuriously affected are separate requirements for standing.

Alons v. Iowa Dist. Court, 698 N.W.2d 858, 863-864 (Iowa 2005) (internal quotation marks and citations omitted). Qwest has a specific personal or legal interest in this proceeding, because the LECs have charged Qwest unlawful terminating access fees that were premised upon discrimination in the provision of local exchange service. That is, the discriminatory kickbacks and free services are necessary

[23] Reasnor argues it did not discriminate because it made no payments to One Rate. Reasnor still unreasonably discriminated because One Rate paid nothing for the services provided to it. Reasnor's kickbacks were even more knowingly unlawful than if it had paid them to One Rate: [[redacted]]. Thus, both Reasnor and Sully knew they were violating the law with their revenue sharing.

components to the LECs' arrangements with the FCSCs', the ultimate goal of which is to bilk Qwest and other long distance carriers out of money.

Finally, the LECs contend that Qwest is engaging in the same conduct of which it complains, in its resale relationship with [[redacted]]. As noted in Qwest's Opening Brief, this is a complete misrepresentation. [[redacted].] Qwest Brief at 47, citing Tr. at 870-871. Finally, [[redacted]] This is diametrically opposed to the manner in which FCSCs ask the IXCs to subsidize their services.

X. REASNOR'S COUNTERCLAIMS ARE FRIVOLOUS.

A. Introduction

Reasnor's counterclaims are so far-fetched that they do not pass the smell test. Reasnor filed counterclaims hoping to put Qwest on the defensive, arguing that Qwest was doing exactly the same thing as the LECs. However, the record evidence shows that the LECs' conduct is highly unique, Qwest does nothing even remotely close, and Reasnor has no evidence whatsoever to support its counterclaims. The Board should summarily reject them.

B. Reasnor's Claim of Unlawful Self Help or Unlawful Setoff Fails.

Reasnor first complains that Qwest's decision to withhold payments for calls that do not qualify for switched access violates the law as unlawful self-help. Qwest's conduct was perfectly permissible.[24] It is absolutely appropriate to withhold payment of access fees when the carrier is disputing whether

[24] Each of the three citations Reasnor provides in note 152 simply regard the primary jurisdiction doctrine, in which courts determine that technical issues of tariff interpretation are best referred to the agency with regulatory authority. These citations do not address withholding of access fees when the IXC disputes that access charges apply to the traffic.

access charges apply to the calls in question:

> To prevail on its self-claim [sic], INS must prove Qwest unlawfully withheld payment due under the terms of valid and applicable tariff.
>
> * * *
>
> In addition, unlike the defendant in the case cited by INS, Qwest filed with the IUB - the agency that regulates and supervises intrastate transport of telephone calls within the State of Iowa - its petition for declaratory ruling, and the Board held Qwest was not liable to INS for access charges, leaving to future negotiation the determination of any applicable compensation, thereby confirming the reasonableness of Qwest's actions.
>
> In finding Qwest is not liable to INS under the Amended FCC Tariff, and that the original federal tariff is no longer applicable, it follows INS' self-help claim is likewise not applicable.

Iowa Network Services, Inc. v. Qwest Corp., 385 F. Supp. 2d 850, 902-904 (S.D. Iowa 2005), *aff'd*, 466 F.3d 1091 (8th Cir. 2006) (notes omitted; addressing 47 U.S.C. §201(b) unreasonable practice claim). Iowa courts have interpreted the issue of nonpayment consistent with the federal courts. *AT&T Communications of The Midwest, Inc. v. Iowa Utilities Bd.*, 687 N.W.2d 554, 562 (Iowa 2004) (nonpayment was inappropriate only because the claim challenged the reasonableness of the rate). *See,* Qwest Brief at 104. *See also NOS Communications, Inc.*, 830 F. Supp. 225, 226-229 (D.N.J. 1993).

Despite the fact that Reasnor's counsel, Mr. Troup, was involved in the *INS* case, Reasnor ignores this direct precedent and cites instead inapposite FCC decisions. Reasnor argues the FCC requires payment even if services are not covered by a tariff (Reasnor Brief at 44 n.154),[25] and finds withholding is unlawful on services "ordered and received." Reasnor Brief at 44, n.155.[26] Yet none of the cited FCC

[25] Reasnor's citations for this argument (Brief at 44, n.154) do not support its position. As noted *supra*, the FCC's conclusion in *Total Telecommunications* that AT&T should pay a reasonable access rate was reversed and remanded for lack of factual support, and there was no claim of unlawful withholding; *New Valley* and *America's Choice* likewise did not address claims of unlawful withholding.

[26] In *MGC Communications, Inc. v. AT&T*, 15 F.C.C.R. 308, 310 (Dec. 28, 1999) (affirming with modification the Bureau order at 14 FCC Rcd 11647), the FCC ruled that AT&T could not reasonably withhold payment because the FCC deemed AT&T's attempts to terminate the CLEC's provision of access services were equivocal and unclear – and there was no dispute that MGC was providing exchange access. *In re Business WATS, Inc. v. AT&T,* 7 FCC Rcd. 7942, 7942 (1992), stated that a reseller could not obtain emergency relief against being required to pay for "legally effective and overdue tariffed charges for tariffed service that the carrier has duly rendered." Similarly, *In re MCI Telecommunications Corp.* 62 FCC 2d 703, 705-06 (1976), regarded withholding of payment for tariffed services because

decisions involves a dispute over whether the tariff charges applied.

Moreover, Reasnor's arguments as to Qwest's withholding of payment on non-FCSC traffic (until it balances the amount that Qwest had already paid on Reasnor's wrongful charges for FCSC traffic) are without merit. Qwest "short-paid" Reasnor to reflect the amount of unlawful charges that Qwest had already paid to Reasnor before Qwest learned about Reasnor's scam. In similar circumstances, other IXCs have done the same as Qwest: set off the millions that Reasnor scammed from Qwest against the continuing, small invoices for legitimate access charges for calls terminated to *bona fide* end users. *See, e.g., In re Prairiewave Telec., Inc. v. AT&T Communications of the Midwest, Inc.*, 2006 WL 280951 (I.U.B) (Jan. 23, 2006) (AT&T alleged it could not avoid Prairie Wave's excessive access rates; complaint subsequently dismissed on settlement); *In re Sprint Communications Co. v. Danville Mutual Tel. Co., et al.*, 2008 WL 2314825, FCU-07-11 (I.U.B) (May 23, 2008) (noting respondents asserted Sprint was not paying any access charges; as of fall 2008, it appears the case has settled or has been stayed pending a final settlement). In a recent case, an interconnecting carrier withheld payment of power charges based on its dispute regarding the calculation for those charges, and the Board expressly found that late fees under the interconnection agreement were not justified because the withholding was based on a good faith dispute. *In re McLeodUSA Telec. Services, Inc., v. Qwest Corp.*, 2006 WL 2134628, 8 (I.U.B. July 27, 2006), *aff'd on rehearing*, 2007 WL 3169126, 8 (I.U.B. April 17, 2007). Reasnor has already received moneys from Qwest that are far in excess of any legitimate costs Reasnor incurs in providing access to its few end users, and as such, has suffered no harm from Qwest's short-paying.[27]

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while MCI had voluntarily ordered and received the tariffed service, it wished to order a different, lower-priced service that MCI could not obtain from the tariff.

[27] In fact, Reasnor does not cite any Board precedent to support its claim that Qwest's short-paying is unlawful, and does not attempt to show any harm or any legitimate costs in excess of the millions of dollars it has received unlawfully by traffic pumping. Instead, Reasnor cites federal court cases for the irrelevant proposition that tariffed carriers cannot agree with customers to setoffs and must instead receive compensation in cash or cash equivalents, while customers must bring counterclaims. See cases cited in Reasnor Brief at 45 and nn.158, 159. This doctrine has no applicability here: Qwest has not agreed with Reasnor to set off the continuing, small amount of end user access charges. Qwest has instead withheld

Moreover, the LECs are spending the access charges as fast as the IXCs pay them. The only way for Qwest to protect its interest is to short pay the invoices. Specifically, the LECs argue that the Board should not require refunds because the LECs have used the monies to either pay off individuals, spent it, or split it with the FCSCs who are outside the Board's jurisdiction. In essence, the LECs are saying that they can perpetrate a scam, prohibit the carriers from withholding the illegal charges, move the money such that it is non-refundable, and then claim poverty. This is preposterous on its face and contrary to the public interest.

Short-paying invoices also fully accords with the billing dispute terms of the intrastate access tariff in which Reasnor concurs, NECA Tariff FCC No. 5, which recognizes that a customer can withhold payment of disputed fees. Exhibit 35 at § 2.4.1(D)(1). Thus, even if Reasnor's access tariff applied to the FCSC traffic, which it does not, Qwest's withholding of payment is authorized by the tariff.[28]

C. There is No Evidence Qwest Discriminates Between Retail End-Users; the Evidence Shows Qwest Provides Retail End-Users With Non-Discriminatory Service.

Reasnor argues that Qwest's hospitality plus program discriminates between retail end users, by paying one set of customers a fee, and failing to provide the fee to other customers. Brief at 49-53. However, the evidence Reasnor cites in its own brief proves its argument is frivolous and irrelevant.

Reasnor claims Qwest's Hospitality-Plus program, a tariffed product for operator services, is discriminatory. In this situation, agents sign up hotels for operator services. Qwest charges those who make operator assisted calls from the hotels its tariffed rates, and the hotel's "Property Imposed Fee" or PIF. The PIF itself is contained in Qwest's tariffs. Qwest retains its tariff charges, and sends the PIF to the agent, who presumably shares some or all of the fee with the hotel. The end-user of the service – the person in the hotel room making the call – is aware of the charges (including the PIF) and pays the

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payment based on its good faith dispute that Reasnor already has in its possession (or in the control of its owner) millions of dollars that it has wrongfully taken from Qwest in illegal fees.

[28] Reasnor also claims Qwest blocked calls destined for One Rate. The facts show that this assertion is completely baseless as Ms. Hensley-Eckert explained in detail in her rebuttal testimony. *See* Exhibit 1293 (Hensley-Eckert Rebuttal) at 2-10.

charge. Thus, Qwest does not discriminate in any sense of the word. Qwest simply follows its tariff. Reasnor spends pages of its brief arguing that under the hospitality-plus program Qwest pays commissions to some of its customers; this is untrue. Qwest pays commissions to its sales agents. Indeed, Reasnor quotes the contract stating that "Qwest agrees to pay agent a Commission." Brief at 51. Qwest treats all customers under this tariff exactly the same. Finally, the FCC has specifically addressed hospitality plus programs and found them appropriate. Tr. at 1328; Exhibit 1371. In rendering the decision, the FCC found that the end-user on the operator services call is the person making the call from the hotel room. The person making the call is making a conscious choice to pay the fee, including the PIF. This is substantially different than the situation at hand where a third party to the transaction – the IXCs – are being forced, through a monopolistic control of terminating switched access, to pay for services they neither want nor use, and the true end-users are obtaining the services (*i.e.*, conference, pornographic chat, etc.) free of charge. Moreover, the FCC decision states that a payment back to the "end-user" would be an illegal rebate in violation of law. That is exactly what the LECs and their FCSC partners are trying to do here: rebate money to companies they claim are end-users. Thus, not only does the FCC's decision exonerate Qwest, it shows what the LECs are doing are improper and illegal.

Reasnor also complains that its counterclaim was deprived of support because Qwest "did not produce any agreements with retail customers." Brief at 49. This is completely untrue. Qwest's provides customers with products under the rates, terms and conditions contained in its Rate and Service Schedule (RSS: a functional tariff equivalent after long distance deregulation). Each and every time that a retail customer and Qwest negotiate terms and conditions different than the RSS, Qwest posts the rates, terms and conditions for that agreement on its website at the following address: http://tariffs.qwest.com:8000/Qwest_Service_Agreements/LD_Xpl/LD_FAQs/Index.htm.[29] Tr. at 1314 (Hensley-Eckert). That website has a hotlink entitled "Customized Service Arrangements." When that link is opened, it states: "A Customized Service Arrangement or CSA is an individually negotiated

[29] Reasnor was made aware of this website in response to Data Request No. 53.

transaction tailored to meet the telecommunications needs of the customer for whom it was designated. A CSA frequently involves a combination of domestic, interstate, interexchange service(s) and international service(s)." Each of the CSAs for the last several years are posted. Then, similarly situated customers can obtain the exact same contractual arrangements. Tr. at 1314. This shows two things. First, Reasnor has equal access to examine each and every contractual arrangement that Qwest has with retail customers. Second, it is impossible for anyone to make a case of discrimination because Qwest posts its contractual terms and offers them to customers on a non-discriminatory basis. This is vastly different than the confidential arrangements between the LECs and their FCSC partners. Reasnor has utterly failed to prove its counterclaim. Qwest has not discriminated; to the contrary, the evidence shows Qwest treats its customers the same, and makes sure customers have the tools necessary to evaluate its service offerings.

D. Reasnor's Arguments That Qwest Unlawfully Discriminates In Its Wholesale Long Distance Offerings, or by Offering Discounts to Qwest Corporation, or Violates Rate Averaging Rules Are Completely Frivolous.

Given how baseless its counterclaims are, Reasnor's final attempt is to invent a claim it never asserted, and never even tried to suggest in its pre-filed testimony. Reasnor argues that Qwest unlawfully discriminates in its provision of wholesale long distance services to other IXCs, by offering to least cost route for different IXCs for different rates. Reasnor's claim is to, in essence, challenge the entire basis of least cost routing and claim that such contracts in America are illegal *per se*. Not only was this claim never raised and no evidence presented on it, Reasnor ignores it is impossible to discriminate in the contracts to provide wholesale long-distance services to other long distance carriers. Unlike Reasnor's access services which constitute a monopoly service, the FCC has found long distance services fully competitive and detariffed for over a decade. *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730, ¶21 (1996) (subsequent history omitted); *Ting v. AT&T*, 319 F.3d 1126, 1131-1133 (9th Cir. 2003) (noting FCC's decision that as to long distance services, "enforcement of the tariffing provision is neither necessary to ensure just and reasonable, non-discriminatory rates, nor necessary for the protection of consumers."); *In re Section 272(f)(1) Sunset of* *the BOC Separate Affiliate and Related Requirements*, 22 F.C.C.R. 16440, 16464-16465, 2007 WL 2481147 *13 ¶46, 58, 59 (Aug. 31, 2007); *In re Verizon Communications Inc. and MCI, Inc.*, 20 F.C.C.R. 18433, 18510-18512, 2005 WL 3099625 (2005). This is especially true for wholesale long distance carriage where there are scores of carriers who can provide least cost carriage for other carriers. Thus, carrier to carrier carriage has always been premised on individually negotiated contracts, not tariffs. The law consistently states that the rules regarding discrimination in the area of non-competitive services are dramatically different than those governing discrimination in the provision of services that are subject to competition. *See, e.g., Orloff v FCC*, 352 F. 3d 415, 421 (D.C. Cir. 2003) (in context of non-tariffed service such as wireless, carrier's prices and sales concessions are subject not to Section 203 of the Act, but to market forces).

Reasnor nonetheless attempts to craft an argument that Qwest Communications Corporation ("QCC") – a long distance carrier – discriminates based on Section 272 of the Communications Act. 47 U.S.C. § 272. That provision only applies to Bell Operating Companies, of which QCC is not one. Brief at 47-48. Thus, Section 272 has no bearing or applicability to QCC. To the extent Reasnor argues Section 272 recognizes the potential for discrimination in "wholesale services" in general, without regard to the type of service and whether its market is competitive, Reasnor simply ignores the regulatory reality that long-distance services are competitive and detariffed, while local exchange services remain bottle-necked due to the LEC having control over access to its local exchange end users. It is therefore impossible to claim there are generalized "wholesale services" in which the FCC requires nondiscrimination.[30]

[30] Reasnor also cites to federal cases as "acknowledg[ing] that discrimination can occur in the provision of wholesale services" (Brief at 48, n. 172), but none of the cited cases actually even address a wholesale service. *Ting* regarded retail long-distance services. In *Panatronic USA v. AT&T Corp.*, 287 F.3d 840 (9th Cir. 2002), customers challenged AT&T's delay in charging customers a tariffed universal connectivity charge. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1133 (D.C. Cir. 1984), regards the "Commission's allocation of access charges between carriers and private line users." *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990), regards AT&T's integrated

Nor does Reasnor cite any Iowa authority that would support applying nondiscrimination requirements to wholesale long distance contracts. Reasnor cites (Brief at 56) *In re McLeodUSA Telecommunications Services, Inc. v. Qwest Corp.*, Dkt. FCU 06-20, 2006 Iowa PUC LEXIS 101, 2006 WL 794689 (March 6, 2006), in support, but the order expressly regards claims under Iowa Code § 476.100 – discrimination by an ILEC against CLECs in interconnection, not discrimination in wholesale long distance contracts:

> In its complaint, McLeodUSA bases it claims on alleged violations of Iowa Code §§ 476.100(2), 476.100(3), 476.100(5), and 476.100(7). Iowa Code § 476.100(2) states, in part, that a local exchange carrier shall not:
>
> > 2. Discriminate against another provider of communications services by refusing or delaying access to essential facilities on terms and conditions no less favorable than those the local exchange carrier provides to itself and its affiliates.
>
> This provision does not provide a basis for reviewing the rates charged by Qwest. It could support a claim of rate discrimination, i.e., that Qwest is charging different rates to different providers, but success on that claim would only entitle a claimant to use the lower rate; it would not support a rate case.

McLeodUSA, 2006 WL 794689 (I.U.B) (March 6, 2006). *See also In re McLeodUSA Telec. Services, Inc. v. Qwest Corp.*, 2006 WL 2134628, FCU 06-20 (I.U.B) (July 27, 2006) ("Iowa Code § 476.100 prohibits local exchange carriers from conduct that is harmful to local exchange competition and specifies a number of prohibited acts."). Reasnor offers no Iowa authority supporting a claim of discrimination among wholesale long distance carriers, because no such law exists. The Board accordingly should reject Reasnor's claim.

In addition, Reasnor simply ***presumes*** that the differing rates in Qwest's least-cost routing contracts are the result of unlawful discrimination, rather than arms-length bargaining. *See, e.g., Orloff v FCC*, 352 F. 3d 415, 421 (D.C. Cir. 2003). Reasnor offered no evidence whatsoever on this point. As the counterclaimant, Reasnor bears the burden of proof, and has failed to prove that the differing price discounts in Qwest's least-cost routing contracts are the result of anything other than lawful bargaining.

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services packages provided to large customers. None of these cases even discusses discrimination with respect to wholesale services to other carriers, and Reasnor's citation to them is inexplicable.

Reasnor's next frivolous argument is that Qwest violated rate averaging and rate integration requirements by charging different prices in least-cost routing (wholesale) long distance contracts. Reasnor ignores that rate averaging and integration requirements do not apply to wholesale long distance contracts. Section 254(g) of the Communications Act and the FCC's rules promulgated thereunder require IXCs to offer the same prices to "subscribers." Carriers purchasing wholesale services from Qwest are not "subscribers" under this provision.[31] Indeed, it defies logic to claim that the rate averaging rules apply to least cost routing situations. In this circumstance, one long distance carrier is agreeing to carry the traffic for another carrier into various communities. One cost the least cost router will incur is payment of the LEC's terminating access charge. As Mr. Devolites explained, the carrier sets a terminating rate with the goal of covering that cost. Exhibit 1301 (Devolites Direct) at 8-9. Given that terminating rates change by LEC, this is eminently reasonable. Thus, the rates one long distance carrier charges another to least cost route often change by the call's ultimate destination. Far from being discriminatory, this is the entire basis of least cost routing used by every long distance carrier throughout the United States. Once again, Reasnor's claim is that the entire least cost routing industry – which is well known to the FCC – is illegal, discriminatory and in violation of averaging rules. This is patently baseless. As Ms. Hensley Eckert testified at hearing, Qwest is in compliance with Section 254, and Reasnor's arguments to the contrary are absolutely baseless. Tr. at 1194-99.

Finally, Reasnor argues that Qwest Corporation receives unlawful discriminatory discounts on high capacity circuits from Qwest Communications Corporation. This argument ignores the evidence. The entire basis of Reasnor's claim is one clause in a contract that Reasnor never raised before, never raised any issues concerning it at hearing (Reasnor only introduced the document as an exhibit (587) at the hearing; Reasnor did not ask Qwest's witnesses any questions regarding the substance of the

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[31] 47 CFR §1801(b) (rate integration), tracking 47 U.S.C. § 254(g), states: "A provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each U.S. state at rates no higher than the rates charged to its subscribers in any other state." 47 CFR § 1801(a) (rate averaging) is similar, requiring the averaging of rates among high cost and non-high cost areas.

contract's terms), and never mentioned in its pre-filed testimony. Thus, Qwest has had no real ability to present responsive material explaining the contract. However, when Reasnor moved to compel discovery requests regarding Qwest Corporation's purchases from QCC, Qwest submitted an affidavit from Doug Hsiao. *See* Qwest Confidential Response to Reasnor's Motions to Compel, January 7, 2009, at Exhibit C. Mr. Hsiao's affidavit shows that Qwest Corporation historically paid higher prices than other similarly situated customers of QCC, and now purchases high capacity circuits from QCC on rates, terms and conditions that are similar to the similarly-situated customers. Hsiao Affidavit at ¶5. The Board took official notice of the filings in this proceeding; thus Mr. Hsiao's affidavit is part of the evidentiary record. Tr. 927:24-25.[32] Hence, the only evidence on this point, in the entire record, shows that Qwest does not discriminate in favor of its affiliate, Qwest Corporation.

In sum, Reasnor's counterclaims are baseless. Reasnor is inartfully trying to deflect the Board's attention from the true issue: namely, that the LECs' traffic pumping scheme is illegal, improper, unjust and unreasonable, discriminatory and in violation of the public interest.

XI. CONCLUSION

Qwest's initial post-hearing brief and this responsive brief show each of the LECs violated their local tariffs, their access tariffs and Iowa law in numerous aspects, entitling Qwest to the full relief that it has requested. Accordingly, Qwest respectfully requests that the Board enter an order granting each item of relief requested in Qwest's initial post-hearing brief.

Dated: April 30, 2009.

Respectfully submitted,

by
David S. Sather

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[32] This is consistent with Iowa law, the Board's rules and the Board's practice. *See,* Iowa Code § 17A.14(4); 199 IAC § 7.23(4)(b); *In re LTDS Corp.*, 2002 WL 192094, 1 (Ia.U.B. Jan. 9, 2002) (Board took official notice of the file in the case on the same day as the hearing); *Howell v. Bennett*, 251 Iowa 1319, 1322, 103 N.W.2d 94, 96 (1960) (court took judicial notice of its records in the case).

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<u>CERTIFICATE OF SERVICE</u>

Docket No. FCU-07-02

I hereby certify that I have this day served the foregoing document on the following persons and parties as indicated below:

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Dated this 30th day of April 2009.

EXHIBIT A